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IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

KIM A. SCHMITT,

Petitioner,

v.

SANDRA L. SCHMITT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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for Petitioner Kim A. Schmitt

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150p

QUESTIONS PRESENTED

Is the Decision of the Seventh Circuit in conflict with the plurality decision Texaco v. Pennzoil 481 US 1 (1987) which asserted jurisdiction in a collateral action under 28 USC Section 1983 based upon review of an Interlocutory Order and finding the Rooker-Feldman Doctrine to be an abstention doctrine to create an exception to the otherwise non-reviewability of a Remand Decision in the Context of a Notice of Removal.

Where the "reasons" rather than the "reasoning" on a remand decision are inextricably intertwined in the District Court's Oral Decision and Order relying upon Rooker-Feldman which is an Abstention Doctrine, is the District Court's Decision reviewable as a Final Order.

Is an abstention-based Remand Order under Rooker-Feldman not a bar under 28 USC 1447(b) as it is not a specific ground under § 1447(c) as previously held in Things Remembered Inc. v. Petraraca, 516 US 124 (1995).

Is there a conflict in the Circuits between the standard followed by the Seventh Circuit in this case predicated upon its prior decision in Phoenix Container, L.P. v. Sokoloff 235 F 3d 352 (7th Cir. 2000) with the Eleventh Circuit in In re Bethesda Memorial Hospital Inc. 123 F 3d 1407, 1408 (11th Cir. 1997) stating that (Quakenbush v. Allstate Ins. Co. 517 US 706 (1996) holds that a District Court's Order to remand the case to State Court is a final judgment that can be reviewed on direct appeal and the Fifth Circuit's holding in Eastus v. Blue Bell Creameries L.P. 97 F 3d 100 (5th Cir. 1996) that a Remand Order is reviewable under Quakenbush where it conclusively determines among other things the party's right to have a Constitutional question litigated in Federal Court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") is not reported and is printed in the appendix hereto ("App.") at page 1a. By order of a three judge panel Hon. Kenneth F. Ripple Circuit Judge, Hon. Ilana Diamond Rovner Circuit Judge and Hon. Terence T. Evans Circuit Judge dated September 25, 2001 held that "because Judge Plunkett remanded the case to State Court based on a lack of subject matter jurisdiction, this Appeal is Dismissed.

The Order of the United States District Court for the Northern District of Illinois, ("District Court") No. 01-2782 on Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 0134087 before Paul E. Plunkett Judge.[1]

The Decision of the United States District Court for the Northern District of Illinois, ('District Court") was issued by Order dated June 28, 2001, Docketed June 29, 2001 and orally on June 28, 2001 and stated at the conclusion of the dialogue in open court "Rooker-Feldman says to the Federal Court, . . . stay out of State Court proceedings, the only Court that has the power to review a State Court Decision is in Washington, witness Bush v. Gore I can't touch it." See page 7 of transcript of June 28, 2001.[2]

The Seventh Circuit in its Decision of June 25, 2001 believed that Rooker-Feldman references were to a companion case before Judge Aspen raising 28 USC Section 1983 issues.

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[1]The "Order" is silent as to the reason for Remand (see App -2) however in the Transcript of Proceedings immediately preceding his decision to Remand (page 4 line 19) District Court Judge Plunkett a referenced that Rooker-Feldman prohibits this court from trying to police the State Courts at page of transcript 4 lines 12 to 19 and page 7 lines 7 to 11. App A-5 *et seq.*

[2]However Rooker-Feldman has been limited to final Decisions and in the instant case as in Texaco v. Pennzoil 481 US 1 (1987), a 28 U.S.C. §1983 pleadings involving interlocutory collateral orders, Rooker-Feldman is not a bar to review.

STATEMENT OF JURISDICTION

On September 25, 2001 the United States Court of Appeals for the Seventh Circuit issued its Decision by way of Order and judgment affirming the Decision of the United States District Court for the Northern District of Illinois Eastern Division and remanding the case to State Court found to be based on lack of jurisdiction.

An application for Stay of Mandate from the Decision of the Seventh Circuit has been filed with Justice Stevens on October 15, 2001 after no action had been taken on a Stay of Mandate filed with the Seventh Circuit on October 9, 2001. The Mandate is due to issue on October 17, 2001 and the instant petition for certiorari is expected to be filed on October 17, 2001.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 USC Section 1447
Procedure After Removal Generally: . .

(c) . . . if at any time before final judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded . . .

(d) an Order remanding a case to the State Court from which it was removed is not reviewable on Appeal or otherwise, except that an Order remanding a case to the State Court from which it was removed pursuant to Section 1443 of this title shall be reviewable by Appeal or otherwise.

Section 42 U.S.C. Section 1983:

"Every person who under color of any statute, ordinance, regulation . . . of any state . . . subjecst, or causes to be subjected, any citizen of the United

States within the jurisdiction thereof of the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be libel to the party injured in action at law, suit in equity, or other proper proceeding . . ."

735 ILCS Section 5/2-202
Persons Authorized to Serve Process:

(a) . . . process shall be served by a Sheriff, . . . of some county of the State ... In counties where the population is less than 1,000,000 process may be served without special appointment, by a person who is licensed or registered as a Private Detective under the Private Detective Private Alarm and Private Security Act of 1983 or by a registered employee of a private detective agency certified under that Act. A private detective or licensed employee must supply the sheriff of any county in which he serves process with a copy of his license or certificate . . .

5/2-203
Service on Individuals

(a) "Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there . . . and informing that person of the contents of the summons . . ."

5/2-203.1
Service by Special Order of Court

"If service upon an individual defendant is impractical under items (1) and (2) of subsection (a)

of section 2-203, the plaintiff may move, without notice that the court enter an order directing a comparable method of service. The motion shall be accompanied with an affidavit stating the nature and extent of the investigation made to determine the whereabouts of the defendant and the reasons why service is impractical under items (1) and (2) of subsection (a) of section 2-203, including a specific statement showing that a diligent inquiry as to the location of the individual defendant was made and reasonable efforts to make service had been unsuccessful. This court may order service to be made in any manner consistent with due process."

STATEMENT OF THE CASE

Mrs. Sandra L. Schmitt filed a divorce action in Kane County Illinois which has a population of less than 1,000,000 people against her husband Kim A. Schmitt on February 4, 2000. On June 1, 2000 Mrs. Schmitt filed an Amended Petition for Dissolution of Marriage naming as additional Respondents in Discovery a group of companies among others, it believed were controlled or owned by Kim Schmitt. None of the Respondents in Discovery have been made full parties.

On July 13, 2000 Mrs. Sandra Schmitt by and through her Attorneys now known as the firm of Bochte and Kuzniar filed a Motion for Substitute Service under Illinois law Section 735 ILCS 5/2-203.1 entitled Service By Special Order of Court together with an Affidavit by Mr. Bochte one of the Attorneys for Mrs. Schmitt to which is attached an unsworn report and letter of an investigator retained to locate Mr. Schmitt and a sworn Affidavit of the same investigator within about a two week period subsequent to the initial two week period covered by the unsworn statement (See App a). The Order for Substitute Service was entered ex parte on the same day it was presented on July 13, 2000 in the form drafted by Mrs. Schmitt and her Attorneys with the exception that the court also requested that in addition to the five persons named, anyone of whom could be served, one of them would have to be an attorney

for Mr. Schmitt. See App. a-58. The two attorneys named filed Motions to Quash which were subsequently affirmed in an Interlocutory Appeal to the Appellate Court for the Second District in Illinois. (Attached as Exhibit H to Notice of Removal)

The only person validly served as a result of the Substitute Service was Catherine Boness an employee of Bricks Inc. a company whose shares are wholly-owned by Mr. Kim Schmitt. Ms. Boness is not a managerial employee nor was there any effort made to pierce the corporate veil nor is Ms. Boness even registered as a person to receive service for the corporation.

Mr. Schmitt filed a 28 U.S.C. Section 1983 law suit claiming that his due process rights under the Fourteenth Amendment were violated and that the Affidavit of Mr. Bochte in support of the Motion for Substitute Service inaccurately swore to conclusions not supported by any sworn statements or any facts that Mr. Schmitt was evading service. This suit was filed in the Federal District Court for the Northern District of Illinois Eastern Division on May 31, 2001, was assigned to Chief Judge Marvin Aspen and given the number 01-C-4028. A Counterclaim almost identical to the First Amended Complaint in No. 01-C-4028 was filed with Judge Plunkett in the instant case together with Mr. Schmitt's Response to Motion to Remand (see App a __ and App a __)[3]

The Illinois Substitute Service Statute under which Ms. Boness was served has to be strictly construed according to the only decided case in Illinois on the subject, Mugavero v. Kenzler 317 Ill App 3d 162 (2000). In Mugavero the failure to follow Section 203.1, the Substitute Service Statute strictly and not filing the required Affidavit simultaneously with the Motion for Substitute Service resulted in the Order for Substitute Service being set aside.

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[3]Following Mr. Schmitt's Motion to Transfer the instant case 01-C-4087 pending before Judge Plunkett to earlier numbered case pending before Judge Aspen was held in abeyance pending Judge Plunkett's decision on Motion to Remand.

On June 1, 2001 Kim Schmitt filed a Notice of Removal given the number 01C4087 in the US District Court for the Northern District of Illinois and the case was assigned to Judge Plunkett. Simultaneously with the filing of the Notice of Removal Mr. Kim Schmitt filed a Motion to Consolidate the later numbered case with the earlier numbered case as a related case under the local rules of the Northern District of Illinois. That Motion was Stayed by Judge Aspen awaiting the Decision of Judge Plunkett on the Removal Petition.

On or about June 6, 2001 Mrs. Schmitt through her Attorney filed a Motion to Remand the Notice of Removal. On June 25, 2001 Mr. Schmitt filed Defendant's Response to the Motion to Remand and a Counterclaim under 28 U.S.C. Section 1983 before Judge Plunkett. Mr. Schmitt through his attorney at all times filed a limited and special appearance in the State Court so no answer had been filed. The Counterclaim was identical in substance to the First Amended Complaint in the case before Judge Aspen.

In the Response to the Motion for Remand Mr. Schmitt argued why he had a substantial likelihood of success on his 1983 claim both before Judge Aspen and before Judge Plunkett which Defendant Mr. Schmitt sought to have consolidated and considered as one case. (See App a__)

The requisite State Action required in a 28 U.S.C. 1983 Complaint was alleged to be Mrs. Sandra Schmitt acting together with a private detective under Section 5/2-202 in service upon Catherine Boness under this Court's Decision in Lugar v. Edmondson Oil Co. Inc. 427 US 922 (1982). The deprivation of Fourteenth Amendment Due Process Rights that Mr. Schmitt urged both in the 1983 Complaint and the 1983 Counterclaim were that the substitute service order constituted a denial procedural due process under the Fourteenth Amendment for as there was not an iota of evidence in any Affidavit or any sworn statement from which it could be concluded that Mr. Schmitt was in any way evading process or that a "Diligent Inquiry" as required by 5/2-203.1 had been conducted. (See Mrs. Schmitt's Motion for Service By Special Order of Court supported only by hearsay Affidavit of her counsel

Mr. Bochte which relied upon attached unsworn and sworn Investigative Reports by Mr. Terry Vincent, Private Detective who subsequently served Ms. Boness with Substitute Service (App a _).

The Investigator Mr. Vincent who is also the Private Detective who served Ms. Boness gave no evidence in his report or his sworn Affidavit that Mr. Schmitt was evading process. The nature of his claimed attempted service as set forth were limited to waiting at various locations to see if Mr. Schmitt was there, never making any actual attempt to serve anyone or ask about how he could locate Mr. Schmitt. Mr. Vincent's stakeout in the first two week period over a Memorial Day Weekend at the home of Ms. Boness, who he was told in another hearsay statement that she was a paramour but there is no evidence to that effect. He never saw Mr. Schmitt at any locations where Ms. Boness was present or at any other location.

Mr. Vincent went to at different times to different locations of Bricks Inc. the company in which Mr. Schmitt owned all the shares. He never came into the office at either location to ask for Mr. Schmitt or to attempt to serve him but simply waited outside. There was only this single investigator looking for Mr. Schmitt, Mr. Schmitt could have been at another office or other location where this investigator was not present on those particular days.

The investigator went to the local Kane County Courthouse on two occasions when an unrelated case in which Mr. Schmitt was a party would come up for "status" or court call. There would be no reason to believe that Mr. Schmitt rather than his Attorney would be present at such occasions. Suffice it to say that the Affidavit of Mr. Bochte upon which the Substitute Service Order was based is wholly conclusory without any evidence to back it up. This is readily apparent in also looking at the Vincent unsworn Report and a sworn Affidavit for a subsequent period.

The second violation of the due process rights of Mr. Schmitt occurred as a result of the service upon Ms. Boness an employee of the corporation in which admittedly he owned the shares could not be considered notice to him for purposes of the

requirements of due process such service under the 735 ILCS 5/2-203.1 was not "comparable" service and did not meet the due process requirements. There was no effort made to pierce the corporate veil.

Mr. Schmitt in his Complaint and Counterclaim called the court's attention to Gelderman & Co. Inc. v. John A. Dussault 384 F Supp 566 at 571 (US Dist Ct Northern Dist Il 1974)[4] in which a Deputy US Marshall, actually traced the Defendant to a motel and the Defendant agreed to meet the Marshall the following morning but checked out deliberately prior to meeting the Marshall, to evade the US Marshall's summons. Notwithstanding that clear example of evasion of process District Judge Bauer still found service upon a fellow employee of the Defendant's who happened to be a foreman in that case totally deficient as substitute service and recognized a Constitutional right to in personam jurisdiction and personal service. (See 384 F Supp 571, Fn 1.)

Kim Schmitt also was denied substantive and procedural due process in the failure to follow the strict requirements of a Substitute Service Statute to which was uniformly applicable in all situations

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[4]The Court fully agrees with Plaintiff that the service provisions of the Illinois and Federal statutes were not intended to establish rules for a child's game of hide-and-seek. This Court has never sought to enforce technicalities where the spirit of rules would be defeated. Nevertheless, difficulties in obtaining service of process cannot form the basis for ignoring the clear statutory requirements. The rule that requires personal service is not a technicality, but rather a mainstay in the foundation of due process upon which our legal system is built. The Court cannot lightly ignore the requirements of the rule merely because Plaintiff has made a good yet unsuccessful attempt at compliance." (384 F Supp 571)

The Court went on to find that service upon an employee of Defendant was "insufficient" - because he was not a resident of Defendant's home. The case was not decided under the substitute service provisions of 5-203.1 which was then not the law. But the teachings of Gelderman and the recent Murphy Brothers case in the U.S. Supreme Court (Murphy Brothers Inc. v. Michetti Pipe Stream Inc. 526 U.S. 344 (1999)) making personal service a constitutional corner stone for jurisdiction cannot lightly be set aside by the kind of conclusory Motion filed in this case to obtain substitute service, strict compliance and due process, are the bedrock of personal service and cannot lightly be discarded in this case either.

and was accordingly void for vagueness consistent with this Court Decision in Village of Hoffman Estates v. Flipside Hoffman Estates U.S. 489 (1982)

The dual Constitutional deprivation of a Substitute Service Order being sought and obtained without any evidence of evasion of process, the search not meeting the requirement of "due diligence," and then serving a fellow employee in place of the Defendant is an abuse of fundamental Constitutional rights. (Murphy Brothers, (supra) in which the court concludes ". . . one becomes a party . . . only upon service of a summons \\or other authority-asserting measure stating the time within the party served must appear and defend".

Judge Plunkett heard oral argument on the Remand Motion in which he indicated he examined the detailed response in opposition by Defendant Kim Schmitt setting forth his due process argument in support of his 1983 claims, a copy of the transcript of that argument App a-5 indicates he understood Kim Schmitt's Constitutional deprivation in service upon a fellow employee (rather than in personam jurisdiction as suggested in Murphy Brothers (supra) Transcript page 3 lines 7 to 18 App a-5 *et seq.*

After statements on the record by Judge Plunkett that he believed Kim Schmitt probably had made out a good 1983 claim both under the state action requirement of Lugar v. Edmondson 427 US 922 (1982) and improper service upon Catherine Boness a fellow employee of the corporation, the court took the position that it was dismissing the case based on its understanding of the Rooker-Feldman Doctrine which in his view did not permit District Courts to resolve Constitutional questions from State Courts but rather required that those matters be taken directly to the US Supreme Court, he cited as an example the courts acceptance in that regard of Bush v. Gore,[5] which in fact as the instant case was actually

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[5] More in point is actually, Siegel v. Lepore 234 F (3d) 1163 (11th Cir. 2000) also dealing with the Bush v. Gore Florida recount in which Defendants (continued...)

review of an interlocutory order—albeit in a case of National Public importance. *See* Page 7 of his transcript lines 6 through 11 (App. a-5 *et seq.*).

Kim Schmitt timely filed his Notice of Appeal with the Seventh Circuit within the 10 day Stay period that had been granted by Judge Plunkett.

The Seventh Circuit in its July 10, 2001 Order asked Mr. Schmitt to show cause why the matter should not be dismissed for want of jurisdiction stating:

> "A preliminary review of the short record indicates that the Order appealed from may not be a final appealable judgment within the meaning of 28 U.S.C. Section 1291. A District Court ordered remanding a case to State Court based on its absence of subject matter jurisdiction is beyond all power of appellate review, whether or not the decision is correct in the present case it appears that the District Court remanded this case to state court based on the absence of subject matter jurisdiction." (see (App a-2))

Kim Schmitt filed a Response to that show cause order stating that Judge Plunkett gave no reason in his Order granting the Remand Motion and in his oral dialogue with counsel appeared to give as his reason the Rooker-Feldman Doctrine which Mr. Schmitt argued was an abstention doctrine and therefore properly a final order under this Court's decisions.

Mr. Schmitt argued to the Seventh Circuit that under the reasoning of Texaco v. Pennzoil 481 US 1 (1987) when a plurality of five Justices agreed that Rooker-Feldman was not a bar asserting jurisdiction over an Interlocutory Order. It was also argued that in

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[5](...continued)
unsuccessfully argued a Rooker-Feldman bar.

the instant case as in the Texaco v. Pennzoil case, 28 US Section 1983 Complaint collateral to an Interlocutory Order of the State Court. The Seventh Circuit should not dismiss as Rooker-Feldman is an abstention based Doctrine and therefore a Final Reviewable Order. In the Texaco case Justice Brennan would have found jurisdiction provided the Constitutional issue involved was an issue of fundamental individual rights as opposed to questions of corporate rights he thought could be pursued elsewhere. We submit we have that individual deprivation of rights, that Kim Schmitt has suffered here.

On September 25, 2001 a Panel of the Seventh Circuit issued its Order based upon prior Decisions of the Seventh Circuit particularly Phoenix Container, L.P. v. Sokoloff 235 F 3d 352, 355 (7th Cir. 2000) holding "(a Court of Appeals must look at the reason for remanding rather than the reasoning supporting that decision") emphasis in original and also citing In re Continental Casualty Co. 29 F 3d 292, 293 (7th Cir. 1994), and held the reason the court remanded the case was not pursuant to the Rooker-Feldman Doctrine but rather because there was "no subject matter jurisdiction".

Petitioner Kim A. Schmitt files this Petition for Writ of Certiorari in the good faith belief the questions presented are questions of general public importance and that there is a conflict in the Circuits concerning the issues of reviewability of remand decisions and that a fair reading of the transcript of Judge Plunkett shows that the Rooker-Feldman Doctrine was the reason as well as the reasoning for the actions of that court. The Rooker-Feldman Doctrine consistent with prior Decision of this Court is an abstention doctrine, the questions involved are final orders and are subject to Appeal.

ARGUMENT

A. THE DISTRICT COURT REMANDED DUE TO THE ROOKER-FELDMAN DOCTRINE

We respectfully believe that a fair reading of Judge Plunkett's Decision when we recognize that in the oral argument in which he was the principal speaker, responding to Defendant Kim Schmitt's Response to the Petition to Remand (see App a-60) which largely dealt with the inequities in lack of in personam jurisdiction over Kim Schmitt and the 1983 due process issues of Kim Schmitt not having evaded service and yet being subjected to an erroneously issued substitute service order that did not comport with the strict construction requirement of the relevant Illinois Substitute Service Statute and that there was not any evidence to support that he evaded service. Nor was it proper as to serve a fellow employee Catherine Boness which further deprived him of his Constitutional Rights. Judge Plunkett's grant of Respondent's Motion to Remand was predicated upon the reason and the reasoning of the Rooker-Feldman Doctrine in view of its incantation at critical times in his pronouncement.

While Judge Plunkett made reference to the fact that the 1983 case was before Judge Aspen, it also was before Judge Plunkett via a § 1983 counterclaim, so that he would have jurisdiction to address those areas consistent with the US Supreme Court's plurality opinion in Texaco v. Pennzoil supra in which five Justices found that where the Appeal is from an Interlocutory Order of a State Court unrelated to the mainstream of the case there is jurisdiction, especially in view of Judge Plunkett's acknowledgement that based on this Court's Lugar v. Edmondson Oil Co Inc. 427 U.S. 922 (1982) decision that correctly indicated state action had been properly set forth in the pleadings. Counsel for Mr. Schmitt specifically asked Judge Plunkett to Stay the divorce proceeding so that either he or Judge Aspen by virtue of the 28 U.S.C. 1983 Counterclaim pending before him that had been filed together with Petitioner's response to the Remand Motion could be considered (App a __).

We specifically asked Judge Plunkett to Stay the divorce proceeding and not act on the divorce proceeding but address the 1983 due process questions. It was in that regard that he pronounced that Rooker-Feldman was a bar to his reviewing those issues or in any way considering keeping a divorce case. He

mentioned Rooker-Feldman on two occasions once in regard to the 1983 in discussing Judge Aspen's case at page 4 of Transcript (App. a-5 *et seq.* and the second time at the very end of his Decision he used Rooker-Feldman as a perceived bar to his going forward on any issues. Stating at page 7 of the Transcript (App a-5 *et seq.*).

> "Rooker-Feldman says to the Federal Court, (the Supreme Court's told me this . . . not me personally . . . but the District Courts a hundred times stay out of State Court cases) the only court that has the power to review a State Court Decision is in Washington, witness Bush v. Gore I can't touch it."

We submit that shows that not only the reasoning but the reason for the court's action is Rooker-Feldman. We recognize that this Court will not take a case on certiorari to overturn the Decision of the Court of Appeals, however, the reason we ask this Court to take this case and find as a matter of general public importance that where there is a substantial deprivation of fundamental Constitutional rights in a State Court's interlocutory orders without in personam jurisdiction where there is absolutely no evidence that there is evasion of process by the Defendant. In that narrow class of cases involving fundamental Constitutional rights Justice Brennan in his concurring opinion in Texaco v. Pennzoil would have concluded that the Texaco 1983 case which also involved Appeal from an Interlocutory Order collateral to the main proceeding was of sufficient importance to address the problem.

We say that we have such a fundamental Constitutional right here both because of the failure to show any evasion of service and even more importantly that the Substitute Service Order requiring service upon an employee of a corporation as the person who presumably will give notice to Kim Schmitt is contrary to our system of jurisprudence and raises a fundamental due process question that underlies the question of the reviewability of the Remand Order.

B. REVIEWABILITY OF REMAND ORDERS GENERALLY

Generally, an order remanding a case back to state court is not reviewable on appeal or on mandamus as the removal statute states that an "order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise." *See* 28 U.S.C. § 1447(d). However, this Court has held that this section does not preclude all review over remand orders and has held that a writ of mandamus after remand is appropriate when the district court has clearly exceeded its statutorily defined powers. *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351-52 (1976), *overruled on other grounds*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714-15 (1996), a federal appellate court's ability to review a remand order is dependent on the district court's stated reasons for remand. *See* 28 U.S.C. §1447(d); Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995). These holdings seem to be in direct conflict with the holding of the Seventh Circuit in the instant case which appears on the face of its Decision to be consistent with its prior treatment of reviewability of remand orders.

It is clear that a federal appellate court cannot review an order of remand based upon a ground found in §1447(c). *See* Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995); Heaton v. Monogram Credit Card Bank, 231 F.3d 994, 997 (5th Cir. 2000). However, other basis for remand may be reviewed, e.g., defects in an untimely filed motion for remand, award of costs and attorney's fees, abstention based remand. *See* Quakenbush v. Allstate Ins. Co., 517 U.S. 706, 714 (1996); In re City of Mobile, 75 F.3d 605, 607 (11th Cir. 1996); Hamilton v. Aetna Life & Cas. Co., 5 F.3d 642, 644 (2d Cir. 1993); In re Bethesda Mem. Hosp. Inc., 123 F.3d 1407, 1409-10 (11th Cir. 1997).

In Quakenbush v. Allstate Ins. Co., the district court remanded a case back to state court based upon one of the abstention doctrines. 517 U.S. 706, 714 (1996). The removing party filed an appeal of that order with the Ninth Circuit Court of Appeals, which found that it had jurisdiction to review the remand order. *Id.* The remanding party then appealed that determination

to the United States Supreme Court. The Supreme Court determined that the court of appeals did have jurisdiction over the remand order. The Court stated:

> We agree with the Ninth Circuit and the parties that § 1447(d) interposes no bar to appellate review of the remand order at issue in this case. As we held in Thermtron Products, Inc. v. Hermansdorfer, and reiterated in this Term in Things Remembered, Inc. v. Petrarca, § 1447(d) must be read in pari materia with 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d). This gloss renders § 1447(d) inapplicable here: The district court's abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure. *Id.* (internal citations omitted).

Further, the Court found that the abstention based remand order was "final" for the purposes of 28 U.S.C. § 1291. The Court stated:

> We first concluded that the abstention-based stay order was appealable as a "final decision" under § 1291 because it put the litigants "'effectively out of court,'" and because its effect was "precisely to surrender jurisdiction of a federal suit to a state court." . . . . [a remand order based upon abstention is] [n]o less than an order staying a federal-court action pending adjudication of the dispute in state court, it puts the litigants in this case "'effectively out of court,'" and its effect is "precisely to surrender jurisdiction of a federal suit to a state court," Indeed, the remand order is clearly more "final" than a stay order in this sense. . . . In addition, the rights asserted on appeal from the District Court's abstention decision are, in our view, sufficiently important to warrant an

> immediate appeal. . . . . Admittedly, remand orders like the one entered in this case do not meet the traditional definition of finality – they do not "en[d] the litigation on the merits and leav[e] nothing more for the court to do but execute the judgment. But because the District Court's remand order is functionally indistinguishable from the stay order we found appealable in Moses H. Cone, we conclude that it is appealable, and turn to the merits of the Ninth Circuit's decision respecting Burford abstention.

Id. (internal citations omitted). Therefore, the Court held that abstention based remand orders are "final" and may be appealed.

Further, the Court of Appeals for the Seventh Circuit commented that:

> Appeal rather than mandamus is the right route. Although Thermtron stated that mandamus is essential and appeal impermissible, Quackenbush reversed that conclusion. 517 U.S. at 714-15. The Court [in Quackenbush] observed that the[mandamus requirement] of Thermtron had been based on [an earlier] decision the Justices now deem "superannuated." 517 U.S. at 715. A remand order terminates the litigation in federal court and therefore after Quackenbush is appealable as a "final decision" under 28 U.S.C. § 1291 -- unless § 1447(d) forecloses appeal . . . Benson v. SI Handling Systems, Inc., 188 F.3d 780, 782 (7th Cir. 1999).

To the same effect is WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE, JURISDICTION 2d § 3914.11 (stating that remand terminating all proceedings in a federal court is final; if appeal is barred it is by § 1447(d), not for want of finality); In re Bethesda Mem. Hosp. Inc., 123 F.3d 1407, 1408 (11th Cir. 1997) (stating that: "Quackenbush holds that a District Court's order to

remand a case to state court is a final judgment that can be reviewed on direct appeal); Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100, 103 (5th Cir. 1996) (holding that remand order is reviewable after Quackenbush where; (1) it puts litigants out of federal court; (2) it conclusively determines whether jurisdiction will be exercised; (3) party's right to have matter litigated in federal court is important; and (4) order cannot be reviewed if state court continues to hear case); Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 542 (8th Cir. 1996) (holding that after Quackenbush appeal rather than mandamus is appropriate where by remand District Court surrendered jurisdiction and there is no other opportunity to appeal decision in federal court).

C. REVIEWABILITY OF REMAND ORDER BASED UPON ROOKER-FELDMAN

We have already argued why Petitioner believes District Court remanded the case due to the Rooker/Feldman Doctrine. The Rooker/Feldman doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in the United States Supreme Court. *Asarco, Inc. v. Kadish*, 490 U.S. 605, 622, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 296 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923). Although the United States Supreme Court has held that Congress generally forbids lower federal courts from entertaining appeals from state courts via the Rooker/Feldman Doctrine there is no constitutional prohibition against it doing so. *See* THE FEDERALIST NO. 82, at 494-95. (A. Hamilton) (Rossiter ed. 1961) ("I perceive . . . no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals. . . ."). The Rooker/Feldman Doctrine is derived from 28 U.S.C. section 1257, which states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by

writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Seventh Circuit has described this Doctrine as:

This doctrine articulates the limitations on the district court's power to review state court civil proceedings, and holds that since Congress vested district courts only with original jurisdiction, lower federal courts have no jurisdiction "over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." Thus, "lower federal courts lack jurisdiction to engage in appellate review of state-court determinations," or to consider collateral attacks on state court civil judgments. Beyond the limited authority to examine state judicial proceedings pursuant to habeas corpus review of certain custodial situations, district courts have no authority to review the proceedings or final judgments of state courts. As a result, litigants who feel a state proceeding has violated their constitutional rights must appeal that decision through their state courts and thence to the Supreme Court. Indeed, only the Supreme Court has congressional and constitutional authority to review state proceedings. Federal district and appellate courts have no jurisdiction over such appeals.

Young v. Murphy, 90 F.3d 1225, 1231 (7th Cir. 1996).

The United States Supreme Court held Rooker-Feldman inapplicable to federal cases involving parties other than those before the state court, terming it an "abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994). Following this case, a party that was not involved in the state court action can not be estopped from pursuing a federal claim because of the Rooker/Feldman Doctrine. As the state court in this case never had personal jurisdiction over Mr. Schmitt, he was never a party to the state suit, and therefore, the Rooker/Feldman doctrine should not apply to his current section 1983 federal cause of action. (See also Murphy Brothers, supra.

Further, the Rooker-Feldman doctrine holds that only the United States Supreme Court has jurisdiction to review a final judgment of a state court. *Johnson v. Collins*, 2001 U.S. App. LEXIS 3227 (7th Cir. February 22, 2001).[6] In *Siegel v. Lepore*, the plaintiffs, the Republican candidates for the offices of President and Vice President of the United States, along with several registered Florida voters, filed suit in federal court, seeking to enjoin four Florida counties from conducting manual recounts of ballots cast for President of the United States in the November 7, 2000 election. 234 F.3d 1163 (11th Cir. 2000). The district court denied plaintiffs'

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[6] *Compare Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163 n.11 (10th Cir. 1998) (expressly refusing to rule on whether Rooker/Feldman applies to intermediate state court judgments); *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699 n. 4 (7th Cir. 1998) (The applicability of the Rooker-Feldman doctrine to interlocutory decisions of state courts is an open question); *But see Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194 (4th Cir. 2000) ("Rooker-Feldman also applies to interlocutory orders issued by state courts. Indeed, 'it cannot be the meaning of Rooker-Feldman that, while the inferior federal courts are barred from reviewing final decisions of state courts, they are free to review interlocutory orders.'"); *Sheehan v. Marr*, 207 F.3d 35 (1st Cir. 2000); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 138 (2d Cir. 1997) (internal quotation marks omitted); *see also Charchenko v. City of Stillwater*, 47 F.3d 981, 983 n.1 (8th Cir. 1995) (noting that "Rooker-Feldman is broader than claim and issue preclusion because it does not depend on a final judgment on the merits").

request for preliminary injunctive relief, and plaintiffs appealed. The defendants alleged that the Rooker/Feldman doctrine barred the plaintiffs' present federal suit due to all of the preceding state court litigation. The court of appeals stated:

> In light of the United States Supreme Court's decision vacating the Florida Supreme Court's November 21, 2000, decision, it is unclear at the moment that any final judgments giving rise to Rooker-Feldman concerns now exist. No party has called to our attention any final judgments in the Florida state courts upon which a Rooker-Feldman bar reasonably could be based as to these Plaintiffs. Thus, we conclude that Rooker-Feldman does not bar Plaintiffs from bringing these particular constitutional challenges to the implementation of Florida's manual recount provision.

Therefore, the court held that because there was no final state court judgment, the Rooker/Feldman doctrine did not apply to bar the plaintiffs' suit. Similarly, in this case, there is not a final state court judgment, and the Rooker/Feldman Doctrine should not apply to bar Ms. Schmitt's federal section 1983 suit.

The most significant case to discuss the applicability of the Rooker/Feldman Doctrine in the context of a parties right to file an independent section 1983 cause of action for the deprivation of his constitutional rights in federal court is *Texaco, Inc. v. Pennzoil* Company, 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987). In *Pennzoil Co. v. Texaco, Inc.*, Texaco, having lost in Texas state court, had petitioned the federal district court for an injunction barring any action by Pennzoil to enforce its $ 10.53 billion judgment during the pendency of Texaco's appeal on the merits in state court. Texaco raised both claims previously argued in state court and two fresh constitutional claims under § 1983. *Id.* at 6 n.6, 8. Noting it was not "attempting to sit as a final or intermediate appellate state court as to the merits of the Texas action," the federal district court rejected Pennzoil's Rooker-Feldman argument, asserted jurisdiction, and issued a preliminary injunction. *Id.* at 7

(quoting *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 254 (S.D.N.Y. 1986)). The Second Circuit reversed as to the previously litigated claims, but affirmed as to the fresh § 1983 claims challenging the Texas bond and lien provisions, concluding the fresh constitutional claims were not inextricably intertwined with the underlying state court action. *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1143-45 (2d Cir. 1986), *rev'd*, 481 U.S. 1, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987). The Court of Appeals stated:

> Pennzoil contends that Texaco's claims are barred because Rooker-Feldman should be read broadly to preclude federal review of issues which a party could have raised in the state court proceeding, but chose to withhold from the state court. We disagree. Aside from the absence of any support for Pennzoil's theory in any decision applying Rooker-Feldman, the theory would read 28 U.S.C. § 1257 to severely impair, perhaps negate, a litigant's right to gain equitable or other relief under 42 U.S.C. § 1983, . . . since most claims under§ 1983, especially requests to enjoin ongoing state proceedings, could be raised in a related state proceeding. To relegate the § 1983 claimant in such cases to the state court would ignore Congress' purpose in adopting that statute. Section 1983 was intended 'to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief.' Patsy v. Florida Board of Regents, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct.2557 (1982) . . . . Indeed, the Court has recognized, in the context of criminal proceedings, that a litigant who is not collaterally estopped from raising a § 1983 claim, is not precluded from raising the same claim simply because he had an opportunity to raise it in an earlier state proceeding. Haring v. Prosise, 462 U.S. 306, 76 L. Ed. 2d 595, 103 S. Ct. 2368 (1983). (Emphasis added)

784 F.2d 1133 (2d Cir. 1986); *see also, khal Charidim Kiryas Joel v. Village of Kiryas Joel*, 935 F. Supp. 450 (S.D.N.Y. 1996).

The Supreme Court reversed under the Younger abstention doctrine, 481 U.S. at 10 (relying on *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)), but the Court's treatment of the Rooker-Feldman doctrine provides important guidance on its application. The Court's very invocation of Younger implies the district court properly exercised jurisdiction over Texaco's §1983 claims. As Justice Marshall observed, "there is no occasion to decide if abstention would have been proper unless the District Court had jurisdiction." *Pennzoil*, 481 U.S. at 23 (Marshall, J., concurring in the judgment) (arguing district court's assumption of jurisdiction was "unwarranted"). Justice Scalia, joined by Justice O'Connor, wrote separately only to express his view that Rooker-Feldman did not deprive the district court of jurisdiction to decide Texaco's constitutional challenge to the Texas bond and lien provisions. *Id.* at 18 (Scalia, J., concurring). Justice Brennan, who authored *Feldman*, specifically rejected Pennzoil's Rooker-Feldman argument, finding Texaco's federal action was "'separable from and collateral to' the merits of the state-court judgment." *Id.* at 21 (Brennan, J., concurring in the judgment) (quoting *National Socialist Party v. Skokie*, 432 U.S. 43, 44, 53 L. Ed. 2d 96, 97 S. Ct. 2205 (1977) (citation and quotation marks omitted)).[7] In the end, five justices explicitly rejected application of the Rooker-Feldman doctrine to Texaco's § 1983 challenge to Texas' bond and lien provisions, and three more did so *sub silentio*. *See Pennzoil*, 481 U.S. at 18 (Scalia, J., joined by O'Connor, J. concurring); 481 U.S. at 21 (Brennan, J., concurring in the judgment); id. at 31 n.3

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[7]Justice Brennan stated: "In this case, however, Texaco filed the § 1983 action only to protect its federal constitutional right to a meaningful opportunity for appellate review, not to challenge the merits of the Texas suit. Texaco's federal action seeking a stay of judgment pending appeal is therefore an action "'separable from and collateral to'" the merits of the state-court judgment." Similarly Mr. Shcmitt does not seek review to in any way effect the Divorce Proceedings but only seeks to have a determination of his deprivation of due process, for which there is concurrent jurisdiction in the State and Federal Courts.

(Stevens, J., concurring in the judgment); id. at 28 (Blackmun, J., concurring in the judgment).

The Supreme Court's reasoning in *Pennzoil* indicates that if the purpose of a federal action is "separable from and collateral to" a state court judgment, then the claim is not "inextricably intertwined" merely because the action necessitates some consideration of the merits of the state court judgment. *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163 (10th Cir. 1998) (rev'd trial court order dismissing tribe's section 1983 cause of action due to Rooker).

The United State Supreme Court has recently termed the Rooker/Feldman Doctrine an "abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court." Johnson v. De Grandy, 512 U.S. 997, 1005-06, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994). Additionally, other courts have found that the Rooker/Feldman Doctrine is an abstention type doctrine. *See e.g.,* Hachamovitch v. Debuono, 159 F.3d 687 (2d Cir. 1998) ("Like the abstention doctrines, Rooker-Feldman is a judicially-crafted limitation on federal judicial power."); Regnante v. Jester, No. 97-9194, 1998 U.S.App. LEXIS 20154 (2d Cir. July 1, 1998) (Rooker/Feldman is abstention doctrine); E.B. Verniero, 119 F.3d 1077, 1091 (3d Cir. 1997) (Rooker/Feldman is abstention doctrine); United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995) (Rooker/Feldman Doctrine is "a combination of the abstention and res judicata doctrines"); Hoover v. Wagner, 47 F.3d 845, 952 (7th Cir. 1995) (Rooker/Feldman, Younger Abstention, and dismissal due to equity are all closely analogous); Blue Cross & Blue Shield, Inc. v. Weiner, 868 F.2d 1550 (11th Cir. 1989) (affirmed district court order of abstention due to Rooker/Feldman Doctrine); Guarino v. Larsen, 11 F.3d 1151, 1157 (3d Cir. 1993); Manos v. Caira, 2 001 U.S. Dist. LEXIS 3752 (N.D. Ill. March 29, 2001) (Abstention doctrines are jurisdictional in nature. The Rooker-Feldman abstention doctrine prevents the federal district court's exercise of jurisdiction over the review of decisions of state courts.); Howard v. Borough of Pottstown, 2001 U.S. Dist. LEXIS 1814 (E.D. Pa. February 16, 2001) (court abstained from exercising

jurisdiction due to Rooker/Feldman Doctrine). Therefore, the Seventh Circuit Court of Appeals should have overturned the District Court's order remanding this cause back to state court as the court did so pursuant to the abstention based Rooker/Feldman Doctrine, and pursuant to Quackenbush, the remand order is "final" for the purposes of appeal.

D. THE DECISIONS RELIED UPON BY THE SEVENTH CIRCUIT ARE IN CONFLICT WITH OTHER CIRCUITS AND IN CONFLICT WITH THE ROOKER-FELDMAN DOCTRINE

In its order of September 25, 2001, the Seventh Circuit, citing two of its prior decisions, stated the general rule that "[a] district court order remanding a case to state court based on the absence of subject matter jurisdiction is beyond all power of appellate review." The first case cited by the Seventh Circuit is In re Continental Casualty Co., 29 F.3d 292, 293 (7th Cir. 1994) we have already argued why these cases cited by the Seventh Circuit as well as the instant Decision is in conflict with other circuits finding Remand reviewable in these circumstances.

In Continental, the plaintiff filed suit in state court and served the defendant through the commissioner of insurance. The Defendant removed the case within thirty days of it actually receiving the service papers, but after thirty days from the commissioners actual receipt of the papers. The district court *sua sponte* remanded the action for failure to timely remove the action, even though the plaintiff did not file a motion to remand and actually consented to federal jurisdiction. The defendant appealed the district court's remand order. The Seventh Circuit stated:

> Thermtron and Carnegie-Mellon create three categories of remands, with different consequences for review:
>
> (1) remands on grounds listed in § 1447(c) are beyond the power of appellate review; (2) remands on grounds not listed in § 1447(c) but nonetheless

> sometimes proper, are reviewable to decide whether this is one of those times; (3) remands not authorized by § 1447(c) or anything else, are subject to automatic mandamus.
>
> Several of our cases illustrate the difficulty of putting remands into these pigeonholes; today's adds to the list. . . . Section 1447(c) thus sets up two categories of reasons for remand: a "defect in the removal procedure" and the absence of subject matter jurisdiction. An order of remand based on either of these grounds is beyond all power of appellate review, whether or not the order is erroneous. The district court believed that Continental failed to comply with § 1446(b), so it looks like the case has been remanded "on the basis of [a] defect in the removal procedure" and therefore is beyond review, whether or not the district court correctly understood § 1446(b).
>
> The potential difficulty with this understanding of matters is that the first sentence of § 1447(c) speaks of a "motion to remand". Does this imply that a motion within 30 days is essential for a remand on account of a defect in removal procedure? If the answer is yes, then the district court's remand falls outside the authority of § 1447(c), and appellate review is possible. If lack of a motion not only kicks the remand outside of §1447(c) but also makes the remand unauthorized, then the case falls into category (3), and the litigant who removed the case is entitled to a writ of mandamus.

The Court found that a motion to remand was essential for a remand under the procedural defect found by the district court, and that it did have jurisdiction to determine whether the remand was appropriate.

Like Continental, the instant case should fall under the second category set forth by the Seventh Circuit, i.e., "remands on grounds not listed in § 1447(c) but nonetheless sometimes proper, and reviewable to decide whether this is one of those times." The Rooker/Feldman doctrine, as an abstention-type doctrine, is not a ground listed in section 1447(c) but is nonetheless sometimes proper, and an appellate court should have jurisdiction to review a district court's order remanding a case due to it.

The second case relied upon by the Seventh Circuit in its September 25, 2001 Order was Phoenix Container, L.P. v. Sokoloff, 235 F.3d 352 (7th Cir. 2000). In Sokoloff, the plaintiff brought suit in state court against various defendants. When the last defendant was served with process, he filed a notice of removal, asserting complete diversity of citizenship among the parties. The other defendants all joined the last defendant's notice, but removal was denied because the other defendants were no longer eligible for removal. The last defendant appealed, but the appeal was dismissed. The Court of Appeals held that the remand was correctly based on a conclusion that the notice of removal was untimely, i.e., procedural defect, and that this decision was not reviewable by an appellate court pursuant to section 1447(c). The Court stated, "a court of appeals must look at the reason for remand rather than the reasoning supporting that decision. Otherwise § 1447(d) would amount to little more than a caution against reversing decisions that are not erroneous." This quote clearly sets forth the correct position that in determining whether a court of appeals has jurisdiction over an appeal from a remand order, it should look solely at why the district court remanded a case, i.e., procedural defect, lack of subject matter jurisdiction, crowded docket, or the abstention doctrine, and not look to the merits of the reason, i.e., whether there was truly a procedural defect.

The instant case is distinguishable from Sokoloff in that the reason for the district court's remand in this case was the Rooker/Feldman doctrine, which is an abstention-type doctrine that is not a remand basis contained in section 1447(c). Therefore, the Court of Appeals in this case should have accepted jurisdiction to review the entire remand order.

E. CONCLUSION

We further believe the due process issues raised under 28 U.S.C. 1983 in the Counterclaim filed in the District Court with Judge Plunkett simultaneously with Petitioners response and opposition to Respondent's Motion for Remand are clearly collateral to the divorce case and were only addressed by way of interlocutory order by the Second District's Appellate Court's Decision of April 27, 2001 (Exhibit H to the Notice of Removal.

We respectfully suggest the Seventh Circuit's Order of September 25, 2001 is in conflict with the reasoning of the plurality of decision of five Justices in Texaco v. Pennzoil (supra) on the Rooker-Feldman Doctrine. Like the instant case Texaco v. Pennzoil also involved collateral and interlocutory orders of the type in the instant case.

We respectfully suggest that on it face Judge Plunkett's Remand Order was silent as to any reason. The Seventh Circuit had to examine the Transcript of Oral Argument and colloquy by Judge Plunkett to apply its Doctrine of "reason" vs. "reasoning." We believe the "reason" and "reasoning" are inextricably intertwined in this case as seen from the Transcript of Proceedings before Judge Plunkett believe a fair reading of what Judge Plunkett held is that the Rooker-Feldman Doctrine was a total bar to his accepting either the 1983 Counterclaim or waiting for Judge Aspen to decide the separate 1983 case while he abstained or stayed consideration of the divorce case.

The Application of Rooker-Feldman in the context of an interlocutory order raising a collateral 1983 claim arising in the context of a divorce should not be treated differently than reviewability of other collateral interlocutory Rooker-Feldman claims.

Where the kind of fundamental Constitutional deprivation that Justice Brennan referred to in Texaco is involved in a combined removal and 1983 issue we respectfully urge it meets the general public importance standard for granting of a Petition.

We also respectfully suggest there is an important conflict in the Circuits between the Seventh Circuit views as expressed here and in its prior two decisions with this Court's Decisions in Quakenbush v. Allstate supra and Things Remembered Inc. v. Petrarca, supra. We further believe that we have demonstrated the conflicts with the Eleventh Circuit In re Bethesda Memorial Hospital Inc., supra and the Fifth Circuit in Eastus v. Blue Bell Creameries, L.P., supra.

For all the aforesaid reasons the Petitioner requests the Supreme Court to grant the Petition for Certiorari in order to decide the important questions of federal law in which the Circuits are in conflict and take the opportunity to clarify its holding in Texaco v. Pennzoil how the Rooker-Feldman Doctrine does not bar review of Interlocutory State Court Decisions involving a deprivation of fundamental Constitutional Rights.

Respectfully submitted,

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Date: October 17, 2001

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

September 25, 2001

Before

Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Rana Diamond Rovner, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

SANDRA L. SCHMITT, Plaintiff-Appellee,	]	Appeal from the United States District Court for the Northern District of
No. 01-2782	]	Illinois, Eastern Division.
v.	]	
	]	No. 01 C 4087
KIM A. SCHMITT, Defendant-Appellant.	]	Paul E. Plunkett, Judge.

ORDER

Sandra Schmitt filed a divorce action in the circuit court for Kane County (Illinois). Her husband, Kim Schmitt, removed the action to federal court. District judge Plunkett remanded the case back to state court, and Kim Schmitt filed an appeal of that action.

This court has consistently reminded litigants that an order remanding a case to state court based on a lack of subject matter jurisdiction is not reviewable on appeal, whether or not the decision is correct. See, e.g., *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 355 (7th Cir. 2000) ("a court of appeals must look at the reason for remand rather than the reasoning supporting that decision") (emphasis in original); *in re Continental Casualty Co.*, 29 F.3d 292, 293 (7th Cir. 1994).

The parties dispute the reason Judge Plunkett remanded the case to state court. Appellant Kim Schmitt claims that Judge Plunkett did not give any reason for the remand; he goes on to argue that "it is fair to say that the District Court remanded the case pursuant to the Rooker-Feldman Doctrine." Appellant's Jurisdictional Memorandum at p. 5. Appellee Sandra Schmitt, on the other hand, responds that "a simple reading of Judge Plunkett's decision clearly sets forth his reasons for the remand" - the court "has no subject matter jurisdiction." Appellee's Jurisdictional Memorandum at pp. 2-3. We agree with appellee.

The transcript of the hearing on the motion to remand (held on June 28, 2001) quite clearly sets out Judge Plunkett's views:

> "You got a divorce action over which we all agree that Federal courts have absolutely no jurisdiction.
>
> ***
>
> "So given the fact that you've got a divorce proceeding, there's no way on earth that that in and of itself could get to the Federal court - diversity, citizenship or whatever. It could never get here."

Transcript at pp. 1-2.

These passages speak of the district court's subject matter jurisdiction. other passing references in the transcript to the Rooker-Feldman doctrine appear to be directed to a section 1983 action filed by appellant Kim Schmitt that is pending before Chief District Judge Aspen.

Because Judge Plunkett remanded the case to state court based on a lack of subject matter jurisdiction, this appeal is DISMISSED.

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

July 10, 2001

By the Court:

SANDRA L. SCHMITT, Plaintiff-Appellee,	]	Appeal from the United States District Court for the Northern District of
No. 01-2782	]	Illinois, Eastern Division.
v.	]	
	]	No. 01 C 4087
KIM A. SCHMITT, Defendant-Appellant.	]	Paul E. Plunkett, Judge.

ORDER

A preliminary review of the short record indicates that the order appealed from may not be a final appealable judgment within the meaning of 28 U.S.C. 5 1291.

A district court order remanding a case to state court based on the absence of subject matter jurisdiction is beyond all power of appellate review, whether or not the decision is correct. *In re Continental Casualty Co.*, 29 F.32 292, 293 (7th Cir. 1994); see also *Phoenix Container L.P. v. Sokoloff* 235 F.3d 352 (7th Cir. 2000).

In the present case, it appears that the district court remanded this case to state court based on the absence of subject matter jurisdiction. Accordingly,

IT IS ORDERED that appellant shall file, on or before July 23, 2001, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be suspended pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Michael W. Dobbins
CLERK

Office of the Clerk

Gerard C. Smetana
Smetana & Avakian
39 South LaSalle Street
Suite 1218
Chicago, IL 60603

Case Number: 1:01-CV-04087 Other Court No: 00 DK 0168

Title: Schmitt v. Schmitt

Assigned Judge: Honorable Paul E. Plunkett

MINUTE ORDER of 6/28/01 by Hon. Paul E. Plunkett Defendant's motion for leave to file memorandum in response to motion for remand in excess of 15 pages [5-1], and motion for leave to permit filing of memorandum instanter [5-2] is granted. Plaintiff's motion to remand [3-1] this action to the Sixteenth Judicial Circuit, Kane County, Illinois, is granted and so ordered. Defendant's oral motion to stay remand of this case for 10 days from the date- of this order is granted remanding case to state court, terminating case . Mailed notice

This docket entry was made by the Clerk on June 29, 2001

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil

Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a Minute order or other document is enclosed, please refer to it for additional information.

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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Paul E. Plunkett	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	01 C 4087	DATE	6/28/2001
CASE TITLE	SCHMITT vs. SCHMITT		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY

1) ☐ Filed motion of [use listing in "Motion" box above.]

2) ☐ Brief in support of motion due _____.

3) ☐ Answer brief to motion due _____. Reply to answer brief due _____.

4) ☐ Ruling/Hearing on _____ set for _____ at _____.

5) ☐ Status hearing [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

7) ☐ Trial [set for/re-set for] on _____ at _____.

8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

9) ☐ **This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]**
☐FRCP4(m) ☐General Rule 21 ☐FRCP 41(a)(1) ☐FRCP41(a)(2)

10) ■ [Other docket entry] Defendant's motion for leave to file memorandum in response to motion for remand in excess of 15 pages and motion for leave to permit filing of memorandum instanter is granted. Plaintiff's motion to remand [3-1] this action to the Sixteenth Judicial Circuit, Kane County, Illinois, is Granted and So Ordered. Defendant's oral motion to stay remand of this case for 10 days from date of this order is granted.

1) □ [For further detail see order (on reverse side of/attached to) the original minute order.]

_ No notices required, advised in open court.

_ No notices required.

_ Notices mailed by judge's staff.

_ Notified counsel by telephone.

_ Docketing to mail notices.

_ Mail AO 450 form

_ Copy to judge/magistrate judge.

Date/Time received in central Clerk's Office

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE THE MARRIAGE OF:	)	
SANDRA L. SCHMITT,	)	Docket No. 01 C
	)	4087
Plaintiff,	)	
	)	
vs.	)	Chicago, Illinois
	)	June 28, 2001
KIM A. SCHMITT,	)	9:30 o'clock a.m.
	)	
	)	
Defendant.		

MOTION FOR REMAND
MOTION FOR LEAVE TO FILE
MEMORANDUM AND RESPONSE
BEFORE THE HONORABLE PAUL E. PLUNKETT

APPEARANCES:
For the Plaintiff:
BOCHTE& KUZNIAR, by
MR. THEODORE L.
KUZNIAR
1218 East Main Street
St. Charles, Illinois 60174

For the Defendant:
SMETANA & AVAKIAN, by
MR. GERARD C. SMETANA
1639 South LaSalle Street
Suite 1218
Chicago, Illinois 60603

Laura LaCien, CSR,. RMR
Contract Court Reporter
11 South LaSalle Street
Suite 1150

Chicago, Illinois 60603
(312) 606-0092

(The following proceedings were had in open court:).

THE CLERK: 01 C 4087, Schmitt versus Schmitt, motion for remand and motion for leave to file memorandum and response in excess of 15 pages.

MR. KUZNIAR: Good morning, your Honor. Ted Kuzniar on behalf of Sandra Schmitt.

THE COURT: What's your name, counsel?

MR. KUZNIAR: Ted Kuzniar.

THE COURT: Kuzniar?

MR. KUZNIAR: Yes.

MR., SMETANA: And good morning, your Honor. Gerard Smetana, S-m-e-t-a-n-a, on behalf of the! defendant Kim Schmitt and it's my motion for leave to file an affidavit. A motion a response, rather, in excess of 15 pages. I think I briefed that briefly. I'd like to -- if you'd like to hear argument on that, your Honor.

THE COURT: Well, Mr. Smetana, I've read this whole thing yesterday and I'll let you file this thing but here is my view of what's happened and I don't think you can overcome it in 330 pages much less 32. You got a divorce action over which we all agree the Federal courts have absolutely no jurisdiction.

There's no conceivable way for a Federal court, as a court of special jurisdiction, to deal with divorce any more

than I can deal with states and land and other such things that are peculiar to the jurisdiction of the state court. That's how we start out.

So given the fact that you've got a divorce proceeding, there's no way on earth that that in and of itself could get to the Federal court -- diversity, citizenship or whatever. It could never get here.

Now what happens is as I read these papers is that the -- we'll call her Sandy for fun,.Sandy gets service in a way which infuriates your client somehow because and there are all sorts of machinations where service is there, affidavits filed that Kim Schmitt is running around trying to abate service which you take umbrage with. And then they get an order from a state court judge who says well, since the guy is hiding out, go ahead and serve people but one service has to be of an attorney which is -- I will agree with you on one point, that's a bizarre sort of a procedure but not the first time the state courts of Illinois have surprised me with their procedures.

So there it sits and, by God, they're running out serving secretaries at defendant's business and a woman -- I guess the same person -- who is somehow referred to in sexual connotation -- in a sexual relationship with the defendant all of which is exactly why when I was a young lawyer in trying to decide what field of work I would go into, I decided divorce wasn't one of them.

And so you then file a document or a claim which is captioned under.28 U.S.C. Section 1983 claiming that this is state action and violates the rights of your client and you spend a substantial amount of time dealing with is it state action when an individual uses a state officer to fulfill what is a use of process, sort of -- I'm familiar with a lot of those cases and Luger Oil gives you a place to stand. All of that is fine. You have, sort of, a good faith argument that this might be a state act or you might conceivably have a 1983 action but here's where you and I part company.

You got a 1983 action. You filed it in front of Aspen. Aspen stated what you would attempt to do here is allowing this rump proceeding of the way you were served for which you have full recourse in the state court where the Federal courts under Rooker Feldman do not belong, particularly the district courts trying to police the state court. You would use this problem with service to drag in a divorce case and that I will not permit.

I am going to remand the case. I don't want any more briefing. If you're displeased, and I suspect you are, that's why we have wise people sitting upstairs. But my strong recommendation is that you got a 1983 action, proceed in front of Aspen and make a big fuss about how the service is improper and wrong in the state court but the divorce action is not coming over here. It was remanded today by order of Court but it takes ten days for it to for the clerk to do it. so if you wish to

appeal,.file your notice of appeal promptly to hold it here. You should do it in the next few days. Okay?

MR. SMETANA: May I speak for two seconds and then if he has -- he may have something to say.

THE COURT: Sure.

MR. SMETANA: With regard to your understanding --

THE COURT: You understand, I've read 33 pages of what you had to say.

MR. SMETANA: I appreciate that. You got it right, you got it 100 percent correct but except for one thing and I guess I do part company. One, I guess I would like to have a stay of the order so I can file an appeal so it's clear in the order that I will plan to take the notice of appeal.

THE COURT: All right. But you don't need a stay.

MR. SMETANA: Well, I know. Just to be sure.

THE COURT: It's automatic. Terry and I have gone through this before. It takes seven to ten days for that clerk to transfer the file.

Doesn't it, Terry?

THE CLERK: Yes, Judge.

MR. SMETANA: Right. But they may run back -- I know my colleagues here and they may have a right to ran back absent the stay.

THE COURT:. All right. I'll stay it for ten days to allow you to file a notice.

MR. SMETANA: Secondly, your Honor --

THE COURT: What's next?

MR. SMETANA: -- one thing I did ask and no question in your discretion, which I take it you exercised for sure --

THE COURT: I try.

MR. SMETANA: -- that you hold the matter. I didn't expect you to take jurisdiction over the divorce case and get involved in all this. However, I'm not a divorce lawyer either. This gentleman is a fine, fine lawyer. He really is but I would hope -- my thought really was that during the pendency of resolving the 1983 claim because the 1983 claim contrary to other 1983 claims goes to jurisdiction.

So if there's no jurisdiction over my client, I mean, never served and one thing you talked the -- the problem with the serving --

THE COURT: But that's the state court. If he's never served, that means he's not a party -- there's no jurisdiction of the state court over him.

MR. SMETANA: That's right, but they're running back -- and this is really part of the jurisdictional problem. They're running back and keep getting orders saying do this, do this, do this and, of course, they should all be null and void but they don't seem to be.

THE COURT: Well, why don't you go to the state court judge and say so?

MR. SMETANA: Well, I've tried.

MR. KUZNIAR: He has.

MR. SMETANA: I have. I have, your Honor. It hasn't done any good and that's why --

THE COURT: And that's why you can't come here. Rooker Feldman says to the Federal court, the Supreme courts told me this -- not me personally -- but the district courts a hundred times stay out of state court cases. The only court that has power to review a state court decision is in Washington, witness Bush versus Gore. I can't touch it.

MR. SMETANA: But I'm not asking you to review it. I'm only asking you

THE COURT: What are you asking me to do?

MR. SMETANA: No. I'm asking you to hold it here while you resolve -- you or Judge Aspen. I don't care which one.

THE COURT: You got Aspen. Go ask -- tell Aspen to enter an order staying a state court proceeding but he won't do it for the same reason I just gave you.

But you got a case here and whatever you want to do with it is fine but I will not allow this to happen. And if Richard Posner or Frank Easterbrook or Diane Wood or Joel Pflaum tells me to do it, I'll do it. But short of a mandate from the 7th Circuit, I'm --

MR. SMETANA: You understand, I'm not asking you to decide. I'm asking you simply to hold it.

THE COURT: I understand that. You made that very clear.

MR. SMETANA: Thank you.

THE COURT: Thanks, folks.

MR. KUZNIAR: Thanks.

(Which concluded the proceedings in the above-entitled matter.)

CERTIFICA-TE

I hereby certify that the foregoing is a transcript of proceedings before the Honorable Paul E. Plunkett on June 28, 2001.

DATED: June 28, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE THE MARRIAGE OF	)	
	)	
SANDRA L. SCHMITT,	)	
	)	
Plaintiff/Counter	)	
Defendant,	)	01 C 4087
	)	
v.	)	Judge Plunkett
	)	
KIM A. SCHMITT,	)	Magistrate Geraldine Soat
	)	Brown
Defendant/Counter		
Plaintiff.		

COUNTERCLAIM OF DEFENDANT KIM L. SCHMITT TO FIRST AMENDED COMPLAINT

Kim L. Schmitt, by his Counsel for his Counterclaim against Sandra L. Schmitt, states as follows:

JURISDICTION

1. This Counterclaim is for relief under Section 42 U.S.C. 1983. This Court has jurisdiction pursuant to 28 U.S.C. 1331 and 1342 and Defendant/Counterclaimant herein seeks declaratory relief under 42 U.S.C. Section 1983 pursuant to the

authority of Wolff v. McDonell (1974) 94 S. Ct. 2963, 418 US 539, 41 L. Ed, 2d 616.

2. This Counterclaim is filed exclusively to challenge the lack of jurisdiction over Counter-Plaintiff Kim Schmitt, who continues to maintain as part of his special and limited appearance that he has been denied due process in the proceedings in the case in the State Court without in personam jurisdiction over Defendant Kim Schmitt, Counter Plaintiff herein.

3. This Counterclaim in large part tracks the Complaint also predicated upon 42 U.S.C. Section 1983 jurisdiction pending before the Honorable Chief Aspen in Kim A. Schmitt v. Sandra L. Schmitt 01 C 4028 which has been stayed pending decision by this Court on Plaintiffs Motion to Remand the Case to the State Court.

4. This Counterclaim is filed so that this Court has before it the allegations of lack of due process under 42 U.S.C. Section 1983 made by Counter-Plaintiff. The lack of due process is based upon service upon an employee of Bricks Inc., a company of which Defendant Kim Schmitt is President and sole

shareholder in lieu of service upon him. Additionally the violation of 42 U.S.C. Section 1983 14th Amendment due process is predicated on the unconstitutionality of 735 ILCS 5/2.203.1 in authorizing substitute service for in personam jurisdiction by special order of court without notice to Defendant, and without standards defining (1) "what is comparable service upon a Defendant personally, (2) what makes it "impractical" and (3) what constitutes a "diligent inquiry" to locate Defendant and what constitutes (4) "reasonable efforts" to make personal service upon Defendant. We submit the failure to define those 4 "terms of art" makes the statute void for vagueness.

5. This Counterclaim is a compulsory Counterclaim under Rule 13 of the Federal Rules of Civil Procedure as ". . . it arises out of a transactional occurrence that is the subject matter of the opposing party's claim and does not require adjudication or presence of third parties over whom the Court cannot acquire jurisdiction."

6. This Counterclaim is timely filed as no responsive pleadings have been filed by the Counter Plaintiff/Defendant, as from the outset Kim L. Schmitt Defendant/Counter

Plaintiff has filed a limited and special appearance challenging in personam jurisdiction.

PARTIES

7. Kim A. Schmitt Defendant/Counter Plaintiff herein is an individual who is Defendant in Schmitt v. Schmitt filed in Kane County Circuit Court, No. 00-DK-0168 the subject of the Notice of Removal and is the husband of Sandra L. Schmitt.

8. Sandra L. Schmitt the Plaintiff in Kane County No. 00-DK-0168 is the Plaintiff Counter/Defendant herein.

9. The Sheriff of Kane County is named as an unnamed co-actor together with Sandra L. Schmitt in carrying out the July 13, 2000 Order of Judge Golden that gave rise to the state action that is the subject of this 42 USC 1983 claim of improper service and attempted service on Catherine Boness in lieu of Kim Schmitt.

VENUE

10. Venue is proper in the United States District Court for the Northern District of Illinois pursuant to U.S.C. Section 1391(b) and 28 U.S.C. Section 1965(a). The Court may

take supplemental jurisdiction pursuant to 28 U.S.C. Section 1367(a).

11. Jurisdiction is proper under 42 U.S.C. 1983 as Sandra L. Schmitt acting under color of state law by causing substitute service of process to be made on an employee of Bricks Inc., Catherine Boness, in lieu of personal service on Defendant Kim Schmitt by special order of court obtained on July 13, 2000 pursuant to 735 ILCS 5/2-203.1 acting jointly and severally with the Sheriff of Kane County in serving or attempting to serve process and documents or orders upon Catherine Boness thereby causing state action to be taken depriving Kim L. Schmitt of his right of due process to be served personally rather than court ordered service upon an employee of a corporation of which he is sole shareholder and President and alternatively and separately the order of July 13, 2000 obtained by Sandra L. Schmitt to have an employee served by Special Order of Court in lieu of Personal Service was obtained through an unconstitutional statutory provision 735 ILCS 5/2-203.1 which violated the 14th Amendment due process rights of Kim L. Schmitt effectively declaring under color of state law that

he was evading process of personal service upon him by containing statutory provisions that enabled Sandra L. Schmitt without notice to allege consistent with the unconstitutional statutory provisions of 735 ILCS 5/2-203.1 which are void for vagueness and without statutory due process standards defining how personal service was "impractical" and defining what constitutes a "diligent inquiry" to locate a Defendant and defining what constitutes "reasonable efforts" to have attempted personal service on a Defendant and how the substitute service in that Order was "comparable" to personal service mandate under the Fourteenth Amendment Due Process clause of the U.S. Constitution,

12. The Counterclaim is also proper under Rule 13 of the Federal Rules of Civil Procedures, 18 U.S.C. Section 1964(c) and 735 ILCS 5/13-207 (1995).

FACTS

13. The Petition for Dissolution of Marriage filed by Counter Defendant Sandra L. Schmitt as Plaintiff in the Circuit Court For The Sixteenth Judicial Circuit in Kane County Illinois, Case No. 00 DK 0168 assigned to Judge Patricia P. Golden (see

Exhibit A attached to Notice of Removal). The Petition for Dissolution of Marriage was filed on February 4, 2000.

14. The Amended Petition for Dissolution of Marriage was filed on June 1, 2000 (see Exhibit B attached to Petition for Removal).

15. The Amended Petition for Dissolution was filed pursuant to Order of Judge Golden obtained by ex parte Order on May 30, 2000 granting Petitioner leave to add as additional Defendants business entities and individuals as "Respondents in Discovery".

16. Sandra L. Schmitt Plaintiff/Counter Defendant herein filed a Motion for Special Order of Kane County Court to obtain service of process pursuant to Section 735 ILCS 5/2-203.1 (see Exhibit D attached to Notice of Removal).

17. The Petition for Substitute Service or (by Special Order pursuant to Section 735 ILCS 5/2-203.1) was supported by an Affidavit of William Bochte which is in conclusory form and a violation of procedural due process as the language 735 ILCS 5/2-203.1 is unconstitutionally void for vagueness, on behalf of his client Sandra L. Schmitt and a violation of Counter Defendant's

procedural due process under Section 1983, where as it is claimed in paragraph 11 of the Bochte Affidavit "service upon Kim A. Schmitt is impractical under items (1) and (2) of subsection (a) of 735 ILCS 5/2-203 because of his willful and intentional effort of evading service of process" which in turn is based upon an investigative report which fails to show the requisite "Diligent Inquiry" in attempting to locate Kim Schmitt and fails to show "reasonable efforts" in attempting to serve Kim Schmitt by personal service thereby making service upon Kim Schmitt "impractical". Similarly the affidavit of Terry Vincent simultaneously filed does not exhibit the necessary "Diligent Inquiry" to look for Kim Schmitt to serve Kim Schmitt but rather is based upon a conclusion set forth in the affidavit of Mr. Bochte that Kim Schmitt was evading service sufficient to justify Sandra L. Schmitt's for drafting and obtaining the Order from Judge Golden dated July 13 upon which the substitute service by special Order of Court is based herein that constitutes denial of procedural due process under 42 U.S.C. Section 1983. (See Exhibit G attached to Notice of Removal of a copy of July 13 Order).

18. There is absolutely no showing anywhere or standard, what constitute "comparable" service to meet Due Process requirement under 735 ILCS 5/2-203.1.

19. The Order of Judge Golden of July 13, 2000 has not been complied with as the requisite service upon 2 persons one of whom must be an attorney for Kim Schmitt, as the two attorneys listed were found by order of April 27, 2001 by the Illinois Second District Appellate Court to have properly moved to Quash service because they were not attorneys in fact representing Kim Schmitt at the time.

20. It is mandatory when Orders pursuant to service of summons by special order of Court pursuant to Section 735 ILCS 5/2-2031 are employed must be strictly complied with.

21. The Order specifically required that two persons be served from the group of persons listed in the Order, one of which had to be an attorney.

22. Attorneys were listed in the Order of July 13 in the belief that by serving notice by special order of the Court upon an attorney that would be notice to the Defendant. It was found consistent with the Motions to Quash by the named

attorneys that they were well taken, see the Order of the Second District following interlocutory appeal filed by Defendant Kim Schmitt, Exhibit H attached to Notice of Removal reading at page 12.

23. On information and belief Catherine Boness who was served pursuant to the special order of Judge Golden dated July 13, 2000 was selected in the Order drafted by Plaintiff Sandra L. Schmitt's counsel and sworn to by another counsel in the law firm,

William Bochte, in its Motion for Service by Special Order of Court which in paragraph 10 in states:

> "Catherine Boness, (is) Defendant's alleged paramour . . . (and is) employed by Bricks Inc. a corporation owned or controlled by Kim A. Schmitt. . ."

See Exhibit C attached to Notice of Removal, is acknowledged by the Appellate Court Second District in its April 27, 2001 decision as lacking in any substance or evidence to support a claim that Ms. Boness was Counter Plaintiffs paramour, but the Second District nevertheless concluded that service upon her as an employee was all that was necessary. Stating:

> "Whether Boness is Respondent's paramour is irrelevant. Respondent admits that Boness worked for his company. Court's do not favor those who seek to evade service of summons (citing cases,) consequently under these circumstances, service upon an employee was sufficient to convey notice to Respondent. In other words it is reasonable to believe that an employee would advise his employer that he had been served on the employee's behalf."

(See page 13 of the Opinion of Justice Grometer dated April 27, 2001 of the Appellate Court of Illinois Second District (attached as Exhibit H to the Notice of Removal).

24. On information and belief the State action taken by Plaintiff Sandra L. Schmitt is in furtherance of the Order of Judge Golden causing Catherine Boness to be served was predicated upon a belief by Judge Golden based upon the conclusory affidavit of Mr. Bochte (Exhibit C to the Notice of Removal) that Boness was the Counter Plaintiffs paramour and therefore a person from whom Counter Plaintiff would receive notice.

25. The Order of Judge Golden was not complied with for the double service requirement contained in her Order for service on at least one attorney was stricken by the Second District and therefore the Order was technically not complied

with contrary to the mandate of Mugavero, v. Kenzler 317 111. App. 3d 162 (2000) the only published decision interpreting Sec. 735 ILCS 5/2-203.1.

26. In this case the strict requirements that were not complied with which the Judge specifically mandated in her Order that two separate people be served one of them being a lawyer, as neither lawyer served was in fact counsel for Kim Schmitt at the time consistent with the Illinois Second District Appellate Court's Opinion that the Order falls short of the requirements of the statute.

27. In the absence of in personam jurisdiction all the Orders that Judge Golden has were issued, "ex parte" cited by Counsel for Plaintiff Counter Defendant in their Motion for Remand not only were not actionable or enforceable and must be deemed null and void because of a timely filed Interlocutory appeal raising lack of in personam jurisdiction and a timely filing of an affidavit of intent for leave to file an appeal to the Illinois Supreme Court have all had the result of staying the mandate of the Appellate Court's Order of April 27, 2001 (Exhibit H to Notice of Removal).

28. Counter Defendant Schmitt is not in violation of any State Court Order entered by Judge Golden, as all such Orders are void ab initio in the absence of in personam jurisdiction. (See DiNardo v. Lamela 183 Ill. App. 3d 1098, 1101 (1989)).

29. The service of process upon Ms. Boness as an employee of a corporation whose of shares of stock are owned by Kim Schmitt Counter Defendant is in violation of Fourteenth Amendment due process, absent a piercing of the corporate veil. (See Gelderman & Co Inc v. Dussault 384 F Supp 566 Northern District Illinois E.D. (1974).

30. The action of Sandra L. Schmitt alone and or acting jointly with the Sheriff of Kane County under the color of state law in causing Catherine Boness to be served in lieu of Kim A. Schmitt by Special Order of Court constitutes deprivation of constitutional rights of Kim Schmitt to due process in violation of the Fourteenth Amendment to the United States Constitution.

31. The action of Sandra L. Schmitt acting under color of state law in seeking a special order of court pursuant to a State Statute 735 ILCS 5/2-203.1 which states:

> "Service by Special Order of Court upon an individual Defendant is impractical under Items (1) and (2) of Subsection (a) of Section 2-203, the Plaintiff may move, without notice, that the Court, enter an Order directing a comparable method of service. The Motion shall be accompanied with an Affidavit stating the nature and extent of the investigation made to determine the whereabouts of the Defendant and the reasons why service is impractical under Items (1) (by leaving a copy of the summons with the Defendant personally and (2) by leaving a copy at Defendant's usual place of abode etc.) of Subsection (a) of Section 2-203, including a specific statement showing that a diligent inquiry as to the location of the individual was made and reasonable efforts to make service have been unsuccessful. The Court may order service in any manner consistent with due process".

Sought an order from a Statute that does not comply with due process under the Fourteenth Amendment of the U.S. Constitution as it is void for being vague as it does not define the following terms:

(1) "impractical"

(2) a "comparable" method of service

(3) what constitutes a "diligent inquiry" as to the location of Defendant

(4) what constitutes "reasonable efforts" to make service or if not vague such requirements were not followed.

32. At no time has Kim A. Schmitt been personally served with process of the Summons and Complaint herein (the Petition for Dissolution of Marriage).

33. Kim A. Schmitt has not engaged in evasion of service at any time since the filing of Petition for Dissolution of Marriage in the State Court.

34. The filing of this Counter-Complaint under 42 U.S.C. Section 1983 and the companion Notice for Removal of the State Court Action to this Court is predicated wholly upon jurisdictional grounds does not in and of itself create in personam jurisdiction over Plaintiff Kim Schmitt herein. (See Golden v. Morning News 156 US 518 at 526 (1895)).

35. Removal to the Federal Court and the filing of this Section 1983 Counter-Complaint is timely as Kim A. Schmitt has never been personally served and the substitute service ordered by the Court in its July 13, 2001 Order which Sandra L. Schmitt Counter-Defendant cause to happen jointly and or severally with the Sheriff of Kane County under color of state law in serving Catherine A. Boness created the denial of procedural due process in violation of Fourteenth Amendment

and said service does not constitute personal service, requisite comparable method of service and meeting Fourteenth Amendment Due Process Requirements creating in personam jurisdiction.

36. The State Action taken by Sandra L. Schmitt, Defendant herein in causing service upon an employee of Bricks Inc. Catherine Boness was made under color of state law was done without following any of the mandates under Illinois law for piercing of the corporate veil as set forth in Gallagher v. Renconco Builders Inc. 911 111 App 3d 399 (1980).

37. Service of process upon an employee of Defendant was not found to create requisite in personam jurisdiction and was found to violate due process under the Fourteenth Amendment. (See Gelderman & Co. Inc. v. John A. Dussault 384 F Supp 566, 571 decided US District Court Northern District Illinois October 25, 1974.)

38. Section 42 U.S.C. 1983 states in relevant part:

> "Every person who, under color of any statutes, ordinance, regulation . . . of any state . . . subjects, or causes to be subjected, any citizens of the United States within the jurisdiction thereof of the deprivation of any rights, privileges or

> immunities secured by the Constitution and laws shall be liable to the party injured and action of law suit and equity or other proper proceeding per address . . ."

That section has been interpreted to state that individuals acting under color of state law can be held liable under Section 1983.

39. The state action here that caused the deprivation of Fourteenth Amendment due process in exercising in Personam jurisdiction upon Kim A. Schmitt even though no personal service had ever been obtained on Kim A. Schmitt and he has not evaded service and nor was there a diligent inquiry made to locate his whereabouts, nor was a reasonable effort made to serve him, not was the method of service comparable as required by due process and the requirements for obtaining service of summons by special order of court under 735 ILCS 5/2-203.1 which specifically resulted in the State action being taken by Sandra L. Schmitt pursuant to that order of court in obtaining a special process server to serve Catherine Boness which resulted in the denial of Fourteenth Amendment due process upon Kim A. Schmitt. Also deprived Kim Schmitt of due process as the standards of "diligent inquiry", "reasonable efforts" and

"comparable method of service" are to vague to pass constitutional muster.

40. Justice White in Lugar v. Edmondson Oil Co. Inc. (1982) 102 S. Ct. 2744, 427 US 922, 473 L. Ed 2d 482 held:

> "That if the challenged conduct of Respondent constitutes state action as delineated by prior decisions that the conduct was also under color of state law and will support an action under Section 1983."

41. A private cause of action (or Counterclaim) in the nature Section 1983 Counter-Com plaint may be filed against a private party where that private party engages in state action under color of state laws which results in the deprivation of due process of the other party in the exercise of their rights, privileges and immunities.

42. Sandra L. Schmitt Counter-Defendant herein caused the action to be taken jointly and/or severally with the Kane County Sheriff caused service to be made upon Ms. Boness which action resulted in jurisdiction wrongfully being taken over the person of Kim A. Schmitt under unconstitutional order as a result of it being issued under an unconstitutional provision of the laws of the State of Illinois, i.e. 735 ILCS 5/2-203.1 the State

Court resulting in his denial of Constitutional rights under the Fourteenth Amendment.

43. There is no requirement to exhaust state remedies before filing a Civil Rights Action under the Civil Rights Act. See McNeese v. Board of Education (1963) S. Ct. 1433 at 1435 to 1436 and 373 US 668 at 671 to 673, see also Patsy v. Board of Regents (1982) 102 S. Ct. 2568 and 457 US at 516.

44. No issues have been decided on the merits in the State Court proceeding.

45. Service of process has never properly been made upon Counter-Plaintiff consistent with the due process clause of the Fourteenth Amendment and no decision on the merits has been issued making removal of the cause to the Federal Court together with this Section 1993 Counterclaim timely.

46. For all the aforesaid reasons Counter-Plaintiff alleges that he has been deprived of his civil rights; specifically the denial of due process in a state court exercising jurisdiction over him when no personal service has been obtained, ordering substitute service under a statute 735 ILCS 5/2-203.1 that is void

for being vague in defining the prerequisites for its use where there has been no diligent search for him and there has been no meeting of the burden showing that he has evaded process of service or that the Order that has issued provides for a comparable method of service or notice, and the Order of substitute service by special order is based totally upon substitute service on an employee of a corporation for which he is President and sole shareholder, without any effort to pierce the corporate veil or consider corporate formalities which caused a deprivation of his due process and therefore is a violation of Section 1983 under which Counter-Plaintiff seeks declaratory judgment so that the Court can exercise jurisdiction over the removal of the State Court action to this Court.

47. For all the aforesaid reasons we respectfully move that the Court grant declaratory relief in this Counterclaim finding that Section 42 U.S.C. Section 1983 has been violated as the actions taken by Sandra Schmitt jointly and or severally with the Sheriff of Kane County and that 735 ILCS 5/2-203.1 is void vagueness as not defining the "terms of Art" contained therein and for one or both of these reasons Counter Plaintiff Kim

Schmitt has been deprived of his rights not accorded due process as the State Court accordingly had no in personam jurisdiction and this Court should declare all Orders previously entered void ab initio or hold them in abeyance until such time as proper in Personam jurisdiction is obtained.

Respectfully submitted,

_____

Gerard C. Smetana

Gerard C. Smetana
Smetana & Avakian
39 S. LaSalle Street
Suite 1218
Chicago, IL 60603
312-357-0250

Date: June 25, 2001

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

IN RE THE MARRIAGE OF:	)	
	)	
SANDRA L. SCHMITT,	)	
Plaintiff,	)	
	)	
v.	)	No. 00 DK 0168
	)	
KIM A. SCHMITT,	)	
Defendant.	)	

MOTION FOR SERVICE BY SPECIAL ORDER OF COURT

NOW COMES the Plaintiff, SANDRA L. SCHMITT, by and through her attorneys, BOCHTE, KUZNIAR & MARRESE, P.C., and KIRSH & BERMAN, and in moving this Honorable Court for a Special Order of Court for Service in a manner consistent with due process pursuant to 735 ILCS 5/2-203.1 and in support hereof states as follows;

1. The Petition for Dissolution of Marriage was filed in the above-captioned matter on the 0 day of February, 2000.

2. A Summons issued on May 2, 2000, was returned not found.

3. The first Alias Summons was issued on May 26, 2000 which was returned not found.

4. A second Alias Summons was issued on June 23, 2000 which was returned not found.

5. The Defendant, Kim A. Schmitt is willfully and intentionally engaged in a course of conduct calculated to evade service of process in the above captioned matter.

6. Kim A. Schmitt's intentional evasion effort makes it impractical to serve him under either item (1) or (2) of Subsection A of 735 5/2-203.

7. Service can be had upon Kim A. Schmitt in any manner consistent with due process by Special Order of this Court pursuant to 73 5 ILCS § 5/2-203. 1.

8. Kim A. Schmitt is in regular contact and communication with his mother Lois Schmitt, who resides at 1667 Courtland Drive, Arlington Heights, Illinois 60004.

9. The Defendant Kim A. Schmitt recently filed a Petition for Dissolution of Marriage in Cook County, Illinois under Case No.: 00 00471, wherein the law firm of Pancratz, Riffner & Scott L.P.P. represented him. This lawsuit filed by Kim

A. Schmitt in Cook County was voluntarily dismissed when the issue of inappropriate venue was raised.

10. Catherine Boness, Defendant's alleged paramour, resides at 125 North Van Buren, Batavia, Illinois 605 10 and is employed by Bricks Inc., a corporation owned or controlled by Kim A. Schmitt. Said business is located at 723 South LaSalle Street; Aurora, Illinois.

11. Kim A. Schmitt is represented by Stephen Sullivan an attorney in Batavia, Illinois in a- matter entitled Kim A. Schmitt v. Suzanne Jennings. Kane County Court Case No. CHK 99 657.

12. On information and belief, Kim A. Schmitt is intentionally evading service of process so that he can continue to transfer and dissipate assets before this Court gains control over the martial estate.

13. The Affidavit of William F. Bochte, one of the attorneys for Sanara L. Schmitt, is attached hereto and made a part hereof as Exhibit A.

14. Substitute Service in a manner consistent with due process may be made on the Defendant, Kim A. Schmitt by Special Order of this Court.

WHEREFORE, SANDRA L. SCHMITT prays as follows:

A. That this Court enter an Order providing that service of Summons upon Kim A. Schmitt shall be made by leaving a copy of the Summons and Petition for Dissolution of Marriage with any two of the following individuals,. informing them of the contents of the Summons, and thereafter sending a copy of the Summons to the Defendant at all five places indicated: Lois Schmitt, 1667 Courtland Drive, Arlington Heights, Illinois 60004; Pancratz, Riffner & Scott L.P.P. 1920 North Thoreau Drive, Suite 100, Schaumburg, Illinois 60173; Catherine Boness 126 North Van Buren, Batavia, Illinois 60510; Catherine Boness, c/o Bricks Inc., 723 South LaSalle Street, Aurora, Illinois 60505; and/or Stephen Sullivan, 29 N. River Street, Batavia, Illinois 60510

B. For such further and other relief as this court may deem equitable and just.

SANDRA L. SCHMITT

BY: _____
One of her attorneys

WILLIAM F. BOCHTE
BOCHTE, KUZNIAR & MARRESE, P.C.
1218 E. Main Street
St. Charles, Illinois 60174
630/377-7770
Atty. No. 00239828

SANFORD KIRSH
KIRSH & BERMAN, LTD.
10 South LaSalle Street
Suite 2424
Chicago, Illinois 60603
(312)782-3020

14 June 2000

Theodore L. Kuzniar
Bochte, Kuzniar & Marrese, P.C.
1218 East Main Street
St. Charles, Illinois 60174

Re:	Case Title:	Kim A. Schmitt
	Client:	Sandra L. Schmitt
	AV File:	200073

Dear Mr. Kuzniar:

AV Investigations was requested to locate and effect proper service of a Summons & Complaint upon Kim A. Schmitt as Defendant in the above-captioned matter. It was our understanding that Schmitt has been avoiding service in this matter, and, his current residence is unknown.

Our agency was instructed to initiate this matter by attempting to locate Schmitt over the Memorial Day week-end. We received information that Schmitt could be found at 126 North Van Buren, Batavia, Illinois. Records indicate that this address belongs to Cathy Boness, telephone 630/406-6950.

During the Memorial weekend, I observed a female subject, believed to be Cathy Boness, on several occasions, but I did not observed Kim Schmitt at the residence. Boness drives a tan Jeep that has been observed in the driveway, however, Boness normally parks this vehicle in the garage. I observed only one additional vehicle described as a maroon sedan parked in the garage.

Our agency pursued additional efforts at Bricks, Incorporated at 723 South LaSalle, Aurora, Illinois. This is a two-story, brown brick building set on a comer lot where LaSalle

Street deadends. Employees normally park on the street, however, I have observed vehicles parked inside near the dock. During service attempts, I observed employees come and go from the building, however, I did not observe Kim Schmitt outside the building. They normally keep the front entrance locked during business hours. All vendors had to knock on the door before entry was allowed.

Our agency conducted a background investigation where we learned that Kim Schmitt is a Plaintiff in a civil matter, and his next court date is 19 June 2000 at the Kane County Courthouse in Geneva, Illinois. I have also been in contact with your client who believes that Schmitt might be found at Cathy Bonus's residence on Father's Day, 18 June 2000. Your client indicated the Bonus's kids will be with their father on this date and Schmidt has made no plans to be with his family.

Sources indicate. that Schmidt was downstate Illinois on 05 June 2000 and Bonita Springs, Florida on 07 June 2000. There has been no additional information regarding his whereabouts to date. I have enclosed an interim report along with our agency invoice for services rendered. The return date on the Summons is 26 June 2000. I will place this matter on hold pending further instructions.

Sincerely,
AV Investigations

Terry Vincent

Date: 07 June 2000

CASE TITLE:	KIM SCHMITT	AGENCY: AV
LAW FIRM:	BOCHTE,	INVESTIGATIONS
ATTORNEY:	KUZNIAR	AGENT: TERRY VINCENT
	MICHAEL	AV FILE: 200073
	MARRESE	

On 26 May 2000, AV Investigations was requested to serve a Summons with Notices & Petitions upon Kim Schmitt as Defendant in the above-captioned matter. Initial information provided were two work addresses; Bricks, Inc with locations at 723 South LaSalle Street, Aurora, Illinois and 3425 South Kedzie, Chicago, Illinois. The client provided a possible residence at 126 Van Buren, Batavia, Illinois.

Our agency made attempts at 126 North Van Buren, Batavia, Illinois, and the Aurora and Chicago offices for Bricks, Incorporated. Our agency conducted a limited background investigation upon Kim Schmitt. Contact was made with the client, Sandra Schmitt., to coordinate efforts regarding service in this matter.

The following is a summarization of our investigation to date:

DATA BASE SEARCH

Our agency conducted data base searches for the purposes of determining any property registered under the name of Kim A. Schmitt. The search showed the two addresses for Bricks, Inc. at 723 South LaSalle, Aurora, Illinois 60505, telephone 630/897-6926, and 3425 South Kedzie, Chicago, Illinois 60623, telephone 773/523-5781.

Kim A. Schmitt has a Social Security #S530-38-9344. Date of Birth 4/23/46. Illinois Driver's License #S530-5014-6116. Schmitt showed two additional addresses at 1594 Sublette Road, Amboy, Illinois 613 10 and P.O. Box 512, Batavia, Illinois 605 10.

MOTOR VEHICLE REGISTRATION SEARCH

A motor vehicle search was made for vehicle registered under the name of Kim A. Schmitt. This search showed three vehicles: 1994 Chevrolet Pickup Truck #6369 JA-.B, 1994 Chevrolet Pickup Truck #4717 JM-B, 1994 Chevrolet Pickup Truck #4718 JM-B.

A search was made for vehicles registered under the name of K. A. Schmitt. This search showed five vehicles: 1995 Honda Motorcycle 4980327, 1995 Honda Motorcycle #980587, 1995 Honda Motorcycle #450860, 1999 Hon# Motorcycle #956385, 1994 Jeep #B494801.

Kim A. Schmitt shows a valid Illinois Driver's License Number S530-5014-6116 and has registered the aforementioned vehicles to addresses known as 1594 Sublette Road, Amboy, Illinois 613 0 and 723 South LaSalle, Aurora, Illinois.

A search was made for vehicles registered under the name of Bricks, Incorporated. This search showed several vehicles. A list of these vehicles will be provided at the client's request.

KANE COUNTY LITIGATION SEARCH

A Criminal & Civil Litigation search was conducted for records maintained tinder the name of Kim A. Schmitt at the Kane County Clerk's office in Geneva, Illinois. This search showed two files;

CH K 99 657-Kim Schmitt v. Suzanne Jennings filed on 8/24/99, case management set for 6/19/00 @ 10:30 AM Room

110 Judge Grometer. Attorney for the Plaintiff; Stephen Sullivan, 29 North River Street, Batavia, Illinois.

CH K 95 316-Ranieri Enterprises v. Kim Schmitt/Bricks, Inc. filed on 8/10/95; agreed order to dismiss filed on 2/24/98.

CORPORATION SEARCH

A search was made through the Illinois Secretary of State for information under the entity name of Bricks, Incorporated. This search revealed that Bricks, Inc. was incorporated on 31 May 1978 and records indicate that the company is in good standing. The officers are listed as Kim A. Schmitt as Registered Agent and President, and Arthur Leinweber as Corporate Secretary. The address listed is 723 South LaSalle Street, Aurora, Illinois 60505-5126.

ACTIVITY CHECKS

On 26 May -2000 at approximately 4:30 PM, I attempted service upon Kim Schmitt at Bricks, Inc. located at 723 South LaSalle Street, Aurora, Illinois. There was a tan Jeep parked in front but no evidence of activity. The front door was locked. I knocked repeatedly but there was no answer.

On 27 May 2000 at approximately 9:30 AM, I attempted service at 126 North Van Buren, Batavia, Illinois. The address is described as a large two-story, single family home with a two-car detached garage. There were no vehicles parked in the driveway and no visible evidence of activity. At 11:30 AM, I left the area. Noone was observed coming or going from the residence. I returned a 4:30 PM and then again at 10:15 PM, but there were no vehicles in the driveway and no lights on inside.

On 28 May 2000 at approximately 5:30 PM, the subject believed to be Carol Boness arrived alone driving the tan Jeep. The subject parked in the driveway and went inside the residence. At 6:08 PM, a young, teenage girl appeared briefly in

the front yard. At 7:19 PM, the female subject left alone driving the tan Jeep. The subject went west on Wilson and then north on Route 31. The subject made a bank transaction at Bank One and then went west on Main Street. The subject crossed Randall and pulled into the parking lot at Aldi's grocery store and then left heading north to Cub's foods. The subject pulled into the parking lot and went inside the store. The subject was alone in the tan Jeep bearing Illinois license plates #J 696585. The subject was inside the store for approximately one hour and then left alone with groceries. The subject went back to the residence where she and two younger girls carried in the groceries. Schmitt was not observed at anytime during this activity. At 10:30 PM, I left the area.

On 29 May 2000, at approximately 10:10 AM, the female subject left alone driving the tan Jeep. The subject went south on Prairie and crossed Butterfield Road and proceeded into Aurora, Illinois where she proceeded over Bricks, Inc. located at 723 South LaSalle, Aurora, Illinois. The subject parked in a small garage on the westside on the street and she and a dog went inside the building. There were no other vehicles and no additional activity. At 1:30 PM, I left the area. Noone else came or went from the building. At 5:30 PM, I returned to the residence where I observed the tan Jeep in the driveway. There were no additional vehicles parked in the area. At 7:30 PM, I observed the female subject mowing the lawn. The overhead garage door was opened which revealed an older model maroon vehicle. At 10:00 PM, I left the area. The female subject parked her vehicle in the garage and Schmitt was not observed outside the residence.

On 02 June 2000 at 6:30 PM, I checked the address at 126 North Van Buren, Batavia, Illinois. There were no vehicles parked in the driveway and no visible evidence of activity. I returned at 9:45 PM. There were lights on inside but there were no vehicles parked in the driveway or on the street.

On 03 June 2000 at 12:00 PM, I checked the residence. There were no vehicles in the driveway or evidence of activity.

I returned at 6:00 PM and 8:20 PM, but there were no lights on inside or evidence of activity.

On 05 June 2000 at 12:15 PM, I arrived at the office of Bricks, Inc. located at 723 S. LaSalle, Aurora, Illinois. At 12:45 PM, a white male subject, 55-60 years old left in a green Chevrolet Pick up truck #4717 JM-B. This vehicle is registered to Kim Schmitt. The subject made a food purchase at an area Burger King and then returned back to work. At 1:45 PM, a white male, mid 50's, with dark hair left in a white sedan. At 5:15 PM, the female subject left alone in the tan Jeep. At 5:35 PM, a white male, early 50's, with dark hair, left alone in a red SUV with Wisconsin plates. Kim Schmitt was not observed coming or going from the building.

On 06 June 2000 at approximately 10:40 AM, I attempted service at Bricks, Inc. located at 3425 South Kedzie Avenue, Chicago, Illinois 60623. The address houses a large brickyard and an office building. I attempted service at this location where I was told that Kim Schmitt was not there and no one had any information regarding his whereabouts.

On 06 June 2000 at approximately 2:50 PM, I arrived at Bricks, Inc located at 723 South LaSalle, Aurora, Illinois. At 3:30 PM, the green Jeep bearing Illinois B 494 801 arrived and parked in front. Records indicate that this vehicle is registered to Kim Schmitt. A white male subject, 18-20 years old, went inside briefly, and then left along and proceed over to a residence at Woodruff & Superior. It was later determined that this was the Defendant's son and he went to his girlfriend's house.

Submitted by,

Terry Vincent

30 June 00

Theodore L. Kuzniar
Bochte, Kuzniar & Marrese, P.C.
1218 East Main Street
St. Charles, Illinois 60174

Re:	Case Title:	Kim A. Schmitt
	Client:	Sandra L. Schmitt
	Case No:	00 D K 1068
	AV File:	200073

Dear Mr. Kuzniar:

I have enclosed an Affidavit detailing additional efforts regarding service in this matter to date. Many of the dates and locations stated in our Affidavit were provided by your client.

Through our efforts, we have not located Schmitt at either office location nor have we located a more suitable address. There has been no evidence of Schmitt staying at 126 Van Buren, Batavia, Illinois and records show that Schmitt has not established a more permanent address. Schmitt is involved in a Civil matter that should require his appearance when this matter goes to trial on 14 September 2000. Schmitt is represented in this matter by Attorney Stephen Sullivan in Batavia, Illinois.

I will continue efforts regarding service in this matter through the 4th of July. If you have any questions, I can be contracted at anytime at 847/343/8872.

Sincerely,

AV Investigations
Terry Vincent

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

IN RE THE MARRIAGE OF:	)	
	)	
SANDRA L. SCHMITT,	)	
Plaintiff,	)	
	)	
v.	)	No. 00 DK 0168
	)	
KIM A. SCHMITT,	)	
Defendant.	)	

AFFIDAVIT OF WILLIAM F. BOCHTE

William F. Bochte being first duly sworn under oath deposes and states as follows:

1. He is an attorney licensed to practice law in the State of Illinois.

2. He is a member of the law firm of BOCHTE, KUZNIAR & MARRESE, P.C. retained by SANDRA L. SCHMITT to represent her in the above-captioned matter.

3. Private Investigators from two different agencies have been unable to serve Kim A. Schmitt.

4. Kim A. Schmitt is engaging in a course of conduct calculated to intentionally evade service of process.

5. Summons issued in the above-captioned matter on May 2, 2000, which Summons was returned not found.

6. The first Alias Summons issued in the above-captioned matter on May 26, 2000, which Summons was returned not found.

7. The Second Alias Summons was issued on June 23, 2000, which Summons was returned not found.

8. The individuals named in the attached Motion have access and communication with Kim A. Schmitt on a consistent and regular basis.

9. The Investigative Report of AV Investigations, Inc., dated June 14, 2000 is attached hereto and made a part hereof as Exhibit A.

10. The Affidavit of Terry Vincent of AV Investigations, Inc., is attached hereto and made a part hereof as Exhibit B.

11. Service upon Kim A. Schmitt is impractical under items (1) and (2) of Subsection A of 735 ILCS §5/2-203 because of his willful and intentional effort at evading service of process.

AFFIANT SAYETH NAUGHT.

_____
WILLIAM F. BOCHTE

Subscribed and sworn to before me this
12th day of July, 2000.

_____
Notary Public

WILLIAM F. BOCHTE
BOCHTE, KUZNIAR & MARRESE, P.C.
1218 E. Main Street
St. Charles, Illinois 60174
630/377-7770
Atty. No. 00239828

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

SANDRA L. SCHMITT	)	
	)	
Plaintiff	)	
	)	
vs.	)	CASE NO: 00 D KA 0168
	)	
KIM A. SCHMITT	)	
	)	
Defendant	)	

AFFIDAVIT

Terry Vincent, being first duly sworn of oath, deposes and states as follows:

1. My name is Terry Vincent and I am over 18 years of age.

2. I am employed by AV Investigations, a licensed private detective agency in the State of Illinois and I am not a party to this suit.

3. I am registered as a private detective under the Private Detective Security Act of 1993.

4. AV Investigations was requested to serve a Summons, Notice, and Petitions upon Kim Schmitt as Defendant in the above-captioned matter.

5. On Thursday, 15 June 2000 at 4:00 PM, I attempted service at the Bricks, Inc. located at 723 South LaSalle Street, Aurora, Illinois. I checked area and contacted the

business, via the telephone, where I was told that Schmitt was not there.

6. On Thursday, 15 June 2000 at 6:15 PM, I attempted service at the Shore Club on Broadway, Aurora, Illinois where I observed employees of Bricks, Inc. but I did not observe Schmitt in the tavern.

7. On Friday, 16 June.2000 at 11:10 AM, I attempted service at Bricks, Inc where I was told that Schmitt was not there.

8. On Sunday, 18 June 2000, at 6:00 PM and 8:00 PM, I attempted service 1111 Oxford Court, Lake Zurich, Illinois. I did not observe Schmitt at the residence. It was later verified that Schmitt did not attend this function.

9. On Monday, 19 June 2000, 1 attempted service at the Kane County Courthouse where Schmitt had a scheduled court date as a plaintiff in a civil matter. The case was continued to 26 June 00. Schmitt was not observed in the courtroom or building.

10. On Tuesday, 20 June 2000 at 4:30 PM, I attempted service at Bricks, Inc. in Aurora, Illinois. There were employees leaving the building but I did not observe Schmitt in the building or in the vicinity.

11. On Wednesday, 21 June 2000 at 5:45 AM, I attempted service at Bricks, Inc in Aurora, Illinois. At 6:00 AM, I was approached by a white male in a white station wagon who copied my license plates and then approached my vehicle. The claimant stated that he would find out who. I am and then he entered the building at Bricks, Inc. through a side door.

12. On Thursday, 22 June 2000, at 8:30 AM, I attempted service at Bricks, Inc. located at 3524 South Kedzie,

Chicago, Illinois. The office stated that Schmitt was not there and referred me to a manager.

13. On Friday, 23 June 2000, at 12:00 PM, I attempted service at Bricks, Inc. located at 3524 South Kedzie, Chicago, Illinois. The office stated that he was not there and had no further information..

14. On Saturday, 24 June 2000, at 10:30 AM, I attempted service at Bricks Inc located at 3524 South Kedzie, Chicago, Illinois. There were workers in the yard who related that Schmitt was not there.

15. On Monday, 26 June 2000 at 9:30 AM, I attempted service at the Kane County Courthouse in Geneva, Illinois. This matter was set for trial beginning 14 September 2000. Schmitt was not observed in the Courtroom or in. the vicinity of the building.

16. 25 June 2000, at 1:45 PM, I attempted service upon ~~Kim~~ Schmitt at 3524 South Kedzie, Chicago, Illinois. The office stated that Schmitt was not there and claimed to have no information regarding his schedule.

_____

Terry Vincent

SUBSCRIBED and sworn to before me this
____ day of _____ ___, 2000.

_____

Notary Public

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

IN RE THE MARRIAGE OF:	)	
	)	
SANDRA L. SCHMITT,	)	
Plaintiff,	)	
	)	
v.	)	No. 00 DK 0168
	)	
KIM A. SCHMITT,	)	
Defendant.	)	

ORDER

THIS CAUSE coming on pursuant to the Motion of SANDRA L. SCHMITT for Service of Summons by Special Order of Court pursuant to 735 ILCS 5/2-203.1 and the Court finding that service upon Kim A. Schmitt is impractical under items (1) and (2) of Subsection A of Section 2-203 of the Illinois Code of Civil Procedure and that service can be had upon Kim A. Schmitt in a substituted manner consistent with due process and the Court being otherwise advised in the premises: IT IS HEREBY ORDERED AS FOLLOWS:

A. Service may be had upon Kim A. Schmitt by leaving a copy of the Summons and Petition with any two[8] of the following five individuals or entities and thereafter mailing a copy in a sealed envelope with postage fully prepaid addressed to the Defendant in care of any two of the individuals or entities served: Lois Schmitt, 1667 Courtland Drive, Arlington Heights, Illinois, 60004; Pancratz, Riffner & Scott L.P.P. 1920 North Thoreau Drive, Suite 100, Schaumburg, Illinois 60173; Catherine Boness 126 North Van Buren, Batavia, Illinois 60510; Catherine Boness, c/o Bricks Inc., 723 South LaSalle Street, Aurora, Illinois 60505; and/or Stephen Sullivan, 29 N. River Street, Batavia, Illinois 60510.

2. A copy of this Order shall be served and mailed with the Summons and Petitions herein.

Entered this 13th day of July, 2000

_____
Judge

[8]One of the two individual served must be an Attorney.

WILLIAM F. BOCHTE
BOCHTE, KUZNIAR & MARRESE, P.C.
1218 E. Main Street
St. Charles, Illinois 60174
630/377-7770
Atty. No. 00239828

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE THE MARRIAGE OF	)	
SANDRA L. SCHMITT,	)	
Plaintiff	)	
	)	01 C 4087
v.	)	
	)	Judge Plunkett
KIM A. SCHMITT,	)	
	)	Magistrate Geraldine Soat
Defendant.	)	Brown

DEFENDANT'S RESPONSE TO MOTION FOR REMAND

NOW COMES Kim A. Schmitt by his Counsel Gerard C. Smetana and respectfully files this Response to the Motion for Remand and in support thereof states as follows:

1. Federal jurisdiction is based herein on a violation of Section 42 U.S.C. Section 1983 more particularly a violation of procedural and substantive due process under the Fourteenth Amendment to the United States Constitution by Plaintiff Sandra L. Schmitt through her counsel and actions taken under color of state law causing service to be made upon Catherine Boness an

employee of a corporation of which Kim Schmitt is President and sole shareholder as claiming it to be sufficient to satisfy the requirements of in personam jurisdiction.

2. In the proceeding in state court which is sought to be removed there is no allegation or claim alleging any piercing of the corporate veil or any finding necessary to pierce the corporate veil.

3. The only case that we have been able to find that deals at all with the question whether the service upon an employee of a corporation satisfies the requirements of due process is Gelderman & Co. Inc. v. Dussault 384 F Supp 566 (1974) a decision by Judge Bauer in this District. In that case service was attempted under other provisions of Illinois law which required personal service under the then Section similar Section 203.1 which was not yet in existence to provide a basis for substitute service. In Gelderman service was made upon a foreman who was an employee of the Defendant. That service was found not to be sufficient and a denial of Fourteenth Amendment due process was found based on violations of the long arm statute in

addition to the inappropriateness of service on the individual who was the employee.

4. In the instant case in addition to a separate action alleging violation of 42 U.S.C. Section 1983 pending before Chief Judge Aspen in Kim A. Schmitt v. Sandra L. Schmitt 01 C 4028 which has been stayed by Order of Judge Aspen dated June 8 pending ruling by this Court on the Notice of Removal, we have also filed a Counterclaim before this Court to the State Court Complaint that has been removed and is pending before Your Honor alleging violations of 42 U.S.C. Section 1983. In that Counterclaim we allege Sandra L. Schmitt is acting under color of State Law following what we consider to be an erroneous Order issued by the State Court Judge on July 13, 2000 providing for the equivalent of substitute service under 735 ILCS 5/2-203.1 which Section we allege is unconstitutional in failing to provide standards sufficient to determine the appropriateness of substitute service. Section 2-203.1 set forth in full in paragraph 4 of Plaintiff Sandra Schmitt's Motion to Remand states in pertinent part that a Court may Order (substitute service provided) the Motion shall be accompanied with an Affidavit

stating the nature and extent of the investigation made to determine the whereabouts of the Defendants and the reason why service is "impractical" under items 1 and 2 of subsection 2.203 (which are the normal provisions for (1) personal service or (2) by leaving a copy at the usual place of abode. Section 203.1 also includes a specific statement showing that a "diligent inquiry" as to location of the individual Defendant was made and "reasonable efforts" to make service have been unsuccessful. Then the Court may order service to be made in any manner consistent with due process. The absence of standards any where in the Illinois statutes or the case law defining these latter terms of Art i.e. "Diligent Inquiry" and "Reasonable Efforts" makes the substitute Section void for vagueness and therefore denied Kim Schmitt due process under the Fourteenth Amendment,

5. We suggest that the order of July 13, 2000 was not consistent with due process because it was ordered upon an individual who was an employee of a corporation and moreover, the Order under the rules of the cases in Illinois based on Mugavero v. Kenzler 317 111 App 3d 162 (2000), the only case found which any way interprets what constitutes due process and

proper service on substitute orders permitted by Special Order of Court under Section 203.1, requires that there be strict compliance with the language of the statute and by implication the order that emanates from the Court Order of the Court that was issued providing for such substitute service. In Mugavero there was a minor failure in terms of the presentation of an Affidavit in support of the substitute service as required in Section 203.1, therefore the Court struck down the substitute service in Mugavero. We submit here that not only is there a Constitutional impediment in service upon an employee of a corporation to be a person upon whom proper personal service can be made rather than the individual himself, but that the Order of the Court specifically provided that one of the two persons who were to be served had to be an attorney. The two attorneys that were listed in the Order on July 13, 2000 were found by the Second District in its decision upon interlocutory appeal on the due process issues involved here issued April 22, 2000 (Exhibit H to the Notice of Removal at the bottom of page 12 and the top of page 13) not to be proper candidates for substitute service as they no longer represented Kim Schmitt the

Defendant herein. Therefore valid service could not be made upon these attorneys. That left the only person upon whom service could be made to be Boness (the employee). Thus the requirements of Illinois law under Mugavero were not and could not be complied with, as one of the persons served had to be an attorney as required by the July 13, 2000 Order that gave rise to the substitute service herein. The strict requirements of the Circuit Court's Order were not complied with as the Court clearly intended that there had to be two persons one of whom was an attorney who was required to receive notice for his client and since there was no lawful attorney service as part of the substitute service here but only on an employee of the corporation not only is it a violation of the strict requirements of the Illinois Statute as interpreted by the only Illinois case to interpret Section 203.1, but it is also a violation of constitutional due process. A separate constitutional impediment is the unconstitionality of the state statute itself 736 ILCS 5/2-203.1 which we argue is void for vagueness later in this Response,

6. We respectfully suggest the standard to be used by the Court in determining whether the Removal Petition was

properly filed, should be determined in large measure on a reasonable likelihood of success of Counterclaimant Kim Schmitt in prevailing on his 42 U.S.C. Section 1983 constitutional due process claims set forth in his Counterclaim filed as a matter of right simultaneously with this "Response", that service upon an employee of a corporation can in no circumstance constitute "comparable" notice required under Section 203.1 and the constitutional right to personal service for in personam jurisdiction. The constitutional requirements of in personam jurisdiction cannot be gotten around by the mechanism of Section 203.1 by the standardless, undefined requirements in Section 203.1 of "Diligent Inquiry" and "Reasonable Efforts" creating the separate unconstitutionality of the relevant statutory provisions involved.

7. To adequately raise the due process issues Counter Plaintiff Kim A. Schmitt has also challenged the constitutionality of Section 203.1 specifically as to the lack of standards contained in that section for what constitutes appropriate alternative or substitute service which judges may issue such as whether in this case service upon an employee of

a corporation and no one else is sufficient; what constitutes an affidavit sufficient to satisfy, due process showing that service was "impractical" under Items (1) and (2) of Subsection 5/2-203(a), and what standards are sufficient to constitute a statement showing that a "diligent inquiry" as to the location of the individual Defendant was made and "reasonable efforts" to make service upon Defendant have been unsuccessful.

8. We believe that Counter Plaintiff and Movant Kim A. Schmitt in support of his Notice of Removal has a reasonable likelihood of successful in prevailing upon the lack of constitutional due Process under the Fourteenth Amendment both as to the failure to obtain in personam jurisdiction over Kim Schmitt by claiming that in personam jurisdiction has been obtained by "comparable" service upon an employee of a corporation of which he is President and sole shareholder, Bricks Inc. and the total failure of Section 5/2-203.1 to contain any standards sufficient to comport with due process under the Fourteenth Amendment to show what constitutes "comparable" notice "diligent search" for the Defendant before that Section can be exercised, what constitutes a "diligent inquiry" a term Art in

the Section and, what constitute a reasonable effort to attempt to make service and, what constitutes a statement that service is "impractical".

9. We will see in this Response to the Remand Notice there is substantial likelihood of success given the totally arbitrary and capricious manner in which Sandra Schmitt through her investigative person Lee Vincent the Investigator who's affidavit and statement of search for Kim Schmitt are intended by her attorney Mr. Bochte in an affidavit to meet the requirements of due process under 5/2-203.1 by claiming in that affidavit which is attached as Exhibit E to Kim Schmitt's Notice of Removal in and the affidavit which is wholly conclusory without any supporting documents other than an unsigned investigator's report and the same investigator's later affidavit for a different period of time that "Kim Schmitt engaged in a course of conduct calculated to intentionally evade service of process". There is no support for this. The Motion filed on July 13 by Sandra Schmitt, which on the same date on July 13 resulted in the Order (obviously drafted by Sandra L. Schmitt's counsel) that is the basis of the state action taken by Sandra L. Schmitt in

violation of 42 U.S.C. 1983 was signed by another attorney for Sandra Schmitt. Mr. Kuznair this other attorney, in paragraph 5 of Sandra Schmitt's motion states in conclusory terms that Kim A. Schmitt is "willfully and intentionally engaging in a course of conduct that is calculated to evade service of process" and concludes from that conclusion in the last paragraph that "Kim A. Schmitt's intentional evasion effort makes it impractical to serve him under either item (1) or item (2) of Subsection a of Subsection 735 5/2-203, we say this demonstrates by example the absence of constitutional standards required in Section 203.1 pursuant to which the substitute service Order of July 13, 2000 was obtained.

10. The attorney for Ms. Schmitt in that same Motion in paragraph 10 on a wholly conclusory basis states that "Catherine Boness, "Defendant's paramour" resides at 125 North Van Buren, Batavia . . ." In paragraph 12 this attorney contrary to his partner Mr. Bochte "absolute" sworn affidavit, states "on information and belief Kim A. Schmitt is intentionally evading service of process so that he can continue to transfer and dissipate assets before this Court gains control over the marital

estate. There is absolutely no evidence in anything attached to the Motion or anywhere else that Kim Schmitt is or will or intends to transfer and dissipate assets except the information and belief recited herein and there is absolutely no evidence that Kim Schmitt is intentionally evading process except the conclusory statement in Mr. Bochte's affidavit. The "analysis" that was furnished to the State Court further supports the total lack of standards sufficient for constitutional due process to be maintained for orders issued pursuant to Section 203.1. The total "keystone cop" approach by investigator Vincent contained in the underlying documents attached to Plaintiffs Motion for Substitute Service of July 13, 2000 should be sufficient to deny the Motion for Remand until the Court can determine the likelihood of success of the Section 1983 challenges contained in the Counterclaim. After that determination the Court can determine whether to keep the balance of the State Court proceeding under its supplemental jurisdiction.

11. This substitute service Order of July 13 which is attached as Exhibit G entered the same date as the Motion was clearly prepared by Sandra L. Schmitt's counsel for the Judge's

signature. It provides for service upon Catherine Boness, as the alleged paramour, which appellation is totally based upon hearsay. Interestingly the Circuit Court Judge on July 13, 2000 wrote in her own hand with an asterisk (if the Court will examine Exhibit F attached to the Notice for Removal) that "one of the two individuals served must be an attorney". This specific mandate of the Court has not been complied as the Second District struck down the appropriateness of service upon these attorneys who were served as they were in fact no longer attorneys for Kim Schmitt and their Motion to Quash should have been granted.

12. Defendant Kim Schmitt urges that absent a piercing of the corporate veil it is a denial of due process to obtain in Personam jurisdiction over a citizen merely be serving an employee of a corporation of which he is President and Chief shareholder and further that is a denial of due process, actionable under 42 U.S.C. Section 1983 as well as the provision for substitute service under 5/203.1 which does not meet the most rudimentary requirements of due process in the absence of providing standards for what constitutes a "diligent inquiry"

making it impractical to obtain personal service or what constitutes "reasonable efforts" to look for the Defendants. The underlying predicates for concluding there has been evasion of Process by Kim Schmitt to cause a substitute alternative to be crafted by a Trial Judge.

13. The absence of standards are highlighted by the methods which were employed in this case and Defendant Kim Schmitt believes both service on an employee of a corporation in lieu of personal service on a Defendant cannot create jurisdiction over the Defendant and unconstitutional substitute service statute whose standards have never been tested to see if they meet constitutional muster the Court should not grant the Remand request at this time and continue the divorce proceeding in the Federal Court as part of its supplemental jurisdiction over State Court actions, until after this Court has decided the merits of whether there in fact is a Section 1983 violation or such decision has been made by Chief Judge Aspen, then and only then would it be fair for the Court to then consider whether the matter should be returned to the State Court once the due process issues of in personam jurisdiction have been resolved. If in the

mean time any emergencies arise which this Court must address in the underlying Dissolution of Marriage Petition filed by Plaintiff Sandra L. Schmitt this Court it will be fully invested with the power to deal with those questions.

14. In their Remand Motion Plaintiffs have claimed that Defendant's Notice of Removal is not timely because it was not done within 30 days, however 28 U.S.C. Section 1446(b) states in pertinent part:

> "The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by Defendant through service . . ."

Here personal service or, Kim Schmitt has not been made. Thus there is no in Personam jurisdiction. No constitutionally recognized substitute service upon him has been made thus, Notice of Removal is still timely.

15. The United States Supreme Court has recently addressed this provision and clearly set out when the thirty day period to file a notice of removal begins. In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, the plaintiff filed suit and three days letter faxed a courtesy copy of the complaint to the defendant. 526 U.S. 344, 1119 S.Ct. 1322, 143 L.Ed.2d 448

(1999). The plaintiff then had the defendant served with process three weeks later. *Id.* The defendant filed a notice of removal based upon federal question jurisdiction thirty days after it was served with process and forty four days after receipt of the courtesy copy of the complaint. *Id.* The plaintiff filed a motion to remand based upon the thirty day requirement. *Id.* The United States Supreme Court framed the issue and its answer as follows:

> The question presented is whether the named defendant must be officially summoned to appear in the action before the time to remove begins to run. Or, may the 30-day period start earlier, on the named defendant's receipt, before service of official process, of a "courtesy copy" of the filed complaint faxed by counsel for the plaintiff? We read Congress' provisions for removal in light of a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process. Accordingly, we hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, "through service or otherwise," after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service. (Emphasis Added)

Id. The Court explained its answer as follows:

> In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant. Accordingly, one becomes a Party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the Party served must appear and defend. Unless a named defendant agrees to waive service, the summons continues to function as the sine qua non directing an individual or entity to participate in a civil action or forgo procedural or substantive rights. Nothing in the legislative history of the 1949 amendment so much as hints that Congress, in making changes to accommodate atypical state commencement and complaint filing procedures, intended to dispense with the historic function of service of process as the official trigger for responsive action by an individual or entity named defendant. (Emphasis Added)

Id. Therefore, the start of the thirty day period will vary depending when the defendant receives the summons and the initial pleading: 1) if the summons and initial pleading are served together, the thirty day period begins running on the date of such receipt; 2) if the summons is served first and then the initial pleading, the thirty day period begins to run from the receipt of the initial pleading; or 3) if the initial pleading is received first and then the summons, then the thirty day period begins from the date of the receipt of the summons. *Id.* at 354. The Court

concluded by stating, [i]n sum, it would take a clearer statement than Congress has made to read its endeavor to extend removal time (by adding receipt of the complaint) to effect so strange a change -- to set removal apart from all other responsive acts, to render removal the sole instance in which one's procedural rights slip away before service of a summons, i.e., before one is subject to any court's authority." *Id.*

16. This Court has recently addressed issues that are similar to those raised in this case in *Phoenix Containers v. Sokoloff*, 83 F. Supp. 2d. 928 (N.D. Ill Eastern Division 2000) (Robert Gettlemen, J. presiding). In *Sokoloff*, the basic facts were that after the plaintiffs filed suit in state court against multiple defendants and had the defendants served with process, the defendants filed objections to service of process arid personal jurisdiction. *Id.* On August 16, 1999, one defendant withdrew their objection to service and accepted such. *Id.* at 930. A separate defendant filed a notice of removal on October 8, 1999 with the consent of the other defendants. The plaintiffs filed a motion to remand based upon the thirty day removal requirement of section 1446(b). This Court first followed

Murphy, and held that before the thirty day period begins to run, the defendant must be "formally" served with process. Id. at 931. This Court stated:

> Plaintiffs contend that each defendant was formally served at the moment service of process was initially made. Each defendant, however, moved to quash service. It is well-settled that a challenge to service of process is a challenge to the court's jurisdiction. The defendants preserved their objections to the court's jurisdiction by filing special and limited appearances for the Purpose of contesting service of process and/or jurisdiction. The Court reads the Murphy Court's holding to mean that the thirty-day clock did not begin to run during the time that defendant's motions to quash service were pending before the court. The clock would not begin to run, therefore, until the state court determined that service was proper under state law, or a defendant waived his objections to service. *Id.* at 931. (Emphasis Added)

17. (Similar special and limited appearances were similar filed in this case by Defendant Kim Schmitt.)

18. This Court held that as one defendant waived service of process on August 16, 1999, the thirty day period began on that date, and that the removal was not timely filed in October. Therefore, this Court correctly remanded the case back to state court. This opinion stands for the proposition that the

thirty day removal period does not start until either the defendant consents to jurisdiction and service, or until the defendant's objection to service has been finally resolved, i.e., after appellate proceedings are final. (Not the case in the present case before Your Honor).

19. Additionally, other courts that have interpreted *Murphy Bros.* have consistently held that Proper service must be effected before the thirty day period for removal is triggered. *See Dale v.* IRS, No. CV-F-01-5246-OWW LJO, 2001 U.S. Dist. LEXIS 7013 (D.C. CA. April 27, 2001); *Heavy Constr. v. Local 1205, Intl Bhd.*, No. OOCV 6659, 2001 U.S. Dist. LEXIS 4646 (D.C.N.Y. February 12, 2001); *Griffith v. American Home Products, Inc.*, 85 F.Supp.2d 995 (D.C. Wash. 2000); *Bean v. Warner-Lambert Co.*, No. 99-0594-CV-W-C-ECF, 2000 U.S. Dist. LEXIS 20411 (D.C. Mo. January 26, 2000); *Vaughn v. L.G. Barcus*, No. 99-3506, 2000 U.S. Dist. LEXIS 196 (E.D. La. January 10, 2000); *Heredia v. Transport S.A.S., Inc., 101* F. Supp. 2d 158, 160 (S.D.N.Y. 2000); *Whitaker v. Fresno Telsat Inc.*, No. 99 Civ. 6059, 1999 U.S. Dist. LEXIS 14870 (S.D. N.Y. Sept. 24, 1999); *Ward v. Aetna Life Ins. Co.*, 1999 U.S. Dist. LEXIS 5133,

*2, No. 98 Civ. 542E (W.D.N.Y. April 12, 1999). Importantly, not only must service comply with state service provisions, it must also comply with international treaty law if service is out of the country, and must comply with federal constitutional due process *See Ackerman v. Levine,* 788 F.2d 830, 838-39 (2d Cir. 1986); *Heredia v. Transport S.A.S.,* Inc., 101 F. Supp. 2d 158,160 (S.D.N.Y. 2000); *Paradigm Entertainment, Inc. v. Video Sys. Co., Ltd.,* No.3:99-CV-2004-P, 2000 U.S. Dist. LEXIS 2667 (N.D. Tex. March 3, 2000). Lastly, a party can remove a case before the thirty day period ever starts to run due to ineffective service. *Doney* v. CMI Corp., No. 99-1124-CV-W-6-ECF, 2000 U.S. Dist. LEXIS 6240 (D.C. Mo. May 4, 2000) ("Removal often occurs by defending parties over whom the court lacks personal jurisdiction").

20. As stated above, the thirty day period for removal begins on the date that the defendant is properly served with process or on the date that the defendant consents to the state court's jurisdiction. In this case, Kim Schmitt has never been properly served with process. The service upon Catherine Boness albeit by special order of court is unconstitutional service

of process denying Defendant Kim Schmitt his Fourteenth Amendment due process rights, as we contend that service upon an employee of a corporation is not proper service absent the piercing of the corporate veil.

21. Further, Kim Schmitt has never consented to the state court's jurisdiction over him. Kim Schmitt has never been properly served with process and has never consented to the state court's jurisdiction over him, the thirty day period thus has never begun in this case, and this notice of removal was timely filed.

22. Plaintiff Sandra Schmitt raises an equity argument concerning orders of support and maintenance that have not been complied with. However, all Orders that have been entered by the Circuit Court are null and void if there is no in Personam jurisdiction. See DiNardo v. Lamela 183 111 App 3d 1098 at 1101 (1989) finding that where a trial court does not have personal jurisdiction over a party any Order entered against him is void ab initio and subject to direct collateral attack at any time. Thus we submit all of the equity arguments concerning the lack of payment and failure to follow these Orders by Kim A.

Schmitt urged in the Remand Petition are not ripe and may not be considered in law or equity.

23. The fact that the Second District on April 27, 2001 denied Defendant's Kim Schmitt Interlocutory Appeal and denied a timely Rehearing Petition on May 22, 2001 does not justify the further argument of Counsel for Plaintiff in its Motion for Remand or the further erroneous Order of the Circuit Court entered on May 24, 2001 attached Motion for Remand after a limited and special appearance by Counsel for Kim Schmitt urging lack of jurisdiction in which the Court stated "it had continuing jurisdiction" is contrary to well established law a the decision on an Interlocutory Appeal is not final until the mandate has issued. In the particular case the mandate from the timely filed Appeal which effectively stayed all actions of the State Court not only has not issued but pursuant to the Rules of Illinois Procedure, Counsel for Kim Schmitt has timely filed an Affidavit of intent to seek appeal to the Illinois Supreme Court, this has the further effect of staying the mandate until the timely appeal is decided by the Illinois Supreme Court. That appeal has been filed as a matter of right with the Illinois Supreme

Court. In view of the filing of this Notice of Removal all matters in the Illinois Court are stayed and no mandate will issue at this time and therefore none of the Orders that have been issued by Judge Golden in the Circuit Court have any force and effect at this time and therefore this Court is free to exercise full jurisdiction over this case.

24. Part of the likelihood of success test that this Court should employ with respect to the 1983 claim is whether as we allege Sandra Schmitt a Plaintiff in a divorce case can properly be a person who acts under color of state law sufficient to vest the Court with jurisdiction of the propriety of whether or not a 1983 claim for denial of due process exists. Counter Plaintiff has pled in its Counterclaim that Sandra L. Schmitt acted under color of state law in having her attorneys effectuate the Order of July 13 of Judge Golden entered in the Circuit Court of Kane County to cause service upon Catherine Boness in violation of Counter Plaintiffs Kim Schmitt's constitutional due process rights under the Fourteenth Amendment.

25. 42 U.S.C. Section 1983 provides:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subject, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be libel to the party injured and action at law, suit and equity, or other proper proceeding of redress . . ."

We are seeking in this case declaratory relief purely for the purpose of challenging jurisdiction and alleging that the person who operated under power of State Law was Sandra Schmitt alone and or together with other agents of the State who are named as unnamed co-conspirators such as the Sheriff of Kane County all of whom caused and attempted service to be made upon a person merely by virtue of her being an employee of a corporation as provided for in part to effectuate substitute service.

26. TheU.S. Court of Appeals for the Second Circuit recognized that use of a State's Official office provides the requisite state action element for the cause of action under this Section see Goldschmidt Patchett 686 F 2d 582. The July 13 Order of the State Trial Court pursuant to which Sandra Schmitt,

the Plaintiff, then obtains the assistance of the Sheriff of Kane County and other process servers in serving the summons and various Orders upon Catherine Boness or attempts to serve with the Sheriff and Process Servers and Private Process Servers are all under color of state law. We have found no case which specifically deals with the state action being as a result of an Order of a State Court Judge dealing with the question of jurisdiction or alternate service. The closest case that we have found is a situation where the action of state and county officers with respect to enforcement of a State Supreme Court decision involving condemnation was held to be under color of state law although in that case individual Defendants played no part in the state court proceeding. Sotomura v. Hawaii County District Court of Hawaii 402 F Supp 95(1975).

27. The leading case concerning the question of color of state law based on individual acts under color of state law is Lugar v. Edmondson Oil Co. Inc. 102 S. Ct. 2744, 457 Us 922 and 73 L.Ed 2d 482 cited in our Notice of Removal. In a decision in Lugar the Petitioner was a Lessee operator of a truck stop who was indebted to a supplier Edmonson Oil. Edmonson

sued on the debt in the Virginia State Court. Ancillary to that action and pursuant to State Law Edmonson sought prejudgment attachment of certain of Petitioner's property. The procedure under the prejudgment attachment was essentially an ex parte decision under which a Petitioner believed there was a disposing of or might dispose of his property in order to defeat his creditors he could obtain a Petition of the Clerk of the State Court who would issue a writ of attachment which was then executed by the County Sheriff thus effectively sequestering the property. We suggest there is a strong analogy between that procedure and the procedure under Section 203.1 involved in this case where the attorney on behalf of Sandra Schmitt can come in to the State Court and obtain the equivalent of an ex parte order on the mere belief, and that is exactly what happened here, that Kim Schmitt will dissipate the marital assets and based thereupon together with a perceived inability to serve Kim Schmitt, an ex parte order issued which is the state action which was caused to be taken as a result of Sandra Schmitt, just as the state action in Lugar. Pursuant to that state action based on the substitute service arrangements that were worked out both the

sheriff and private investigators enforced that Order in attempting to and ultimately serving Catherine Boness in lieu of the in personam service upon Kim Schmitt, thus we have the requisite state action which was also found to be the requisite state action in Lugar.

28. In Lugar there was an actual attachment of the property, there orders were issued to attempt to attach property, here a substitute service order issued on July 13, 2000 to provide for unconstitutional service upon Boness. The injury in fact is very similar to the injury in Lugar. In Lugar the question was whether the mere institution by a private litigant in a presumptively valid state judicial proceeding without any prior or subsequent collusion or concerted action by that litigant with the state official constituted action under color of state law, it was found that it did. We have a situation which is actually one step removed from that and a stronger case because in our case one part of the state action takes place after the Order and the other part relates to the unconstitutionality of Section 735 ILCS 5/2-203.1. Our principal claim is the service upon Catherine Boness by Sandra Schmitt in conjunction with the unnamed co-

conspirator, the Sheriff of Kane County following the July 13 Order of the Court is the state action, in addition there is state action in obtaining the Order in the first place as well. The Court in Lugar at 457 US 932 specifically focuses on a series of cases that deal with prejudgment attachment and garnishment post judgment and determine that in the cases there discussed that the state action involved was joint action with a creditor in the securing of the property in dispute citing to Sniadach and North Georgia Finishing Inc. v. Di-Chem, Inc. 419 601, 42 L Ed 2d 751, 95 S.Ct. 719, 1975. In each of these cases cited in Lugar the state agents aided the creditor in securing the disputed property but in each case the federal issue arose in litigation between the creditor and debtor in the state courts and no state official was named as a party. We contend we have a similar situation here where the involvement of the state official in addition to the Judge entering the decision upon an unconstitutional statutory Section 2-203.1, is the Sheriff assisting the investigator in attempting service upon Ms. Boness. The Supreme Court points out that in each of the cases including Sniadach the Court did adjudicate the question of whether the

matter was under color of state law where the matter was being handled essentially by the private individuals. The Court in Lugar stated at 457 US 936:

> "As a matter of substantive constitutional law the state action requirement reflects judicial recognition of the fact that "most rights secured by the Constitution are protected only against infringement by governments."

Citing to Flag Brothers 436 US at 156. The Court went on to state however:

> "In 1883 this Court in the Civil Rights Cases 109 US . . . affirmed the essential dichotomy set forth in the Fourteenth Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful, against which the Fourteenth Amendment offers no shield."

The Court also in Lugar considers a balancing question on the other end where there is no state involvement, citing to a case cited in Petitioner's Remand Petition Moose Lodge Number 1007 v. Irvis 407 US 163 (1972) in which the Court found no equal protection violation and no state action. However, that was because the discriminatory conduct involved was "in no way ascribed to a governmental decision," which we of course can distinguish because here we have the governmental decision of

Judge Golden's, July 13 Order which creates the due process infringement as well, pursuant to which Sandra Schmitt then proceeds to enforce that Order in obtaining both the Sheriff and private process servers to attempt to engage in service upon Catherine Boness an employee of a corporation who can never accept service on behalf of another individual in her company even if he is the President without any evidence of or court order piercing the corporate veil thereby showing she is a proper agent of the private person involved.

29. We like the Plaintiff in Lugar claim that the constitutional deprivation is in part the state created procedure under 203.1 which enables a person such as Sandra Schmitt to obtain an Order for substituted service without any proper standard determining whether Defendant Kim Schmitt is in fact evading service of process and whether there was in fact "due diligence" on their part in attempting to locate Kim Schmitt and secondly and separately whether the order of service upon a person who is only an employee of a corporation and has no other nexus to the Defendant can ever be a proper party upon whom substitute service can be made without denying the

Defendant procedural due process. We say this second act is independently unconstitutional as a result of a Court Order which gave rise to the Sheriff acting with Sandra Schmitt and her agent in attempting service on Catherine Boness. We have two distinct and separate constitutional claims under the Fourteenth Amendment due process and our arguments and allegations concerning Fourteenth Amendment due process are consistent with Supreme Court's holding:

> "At page 457 US 951 (in Lugar) ... We have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. . ."
>
> "Private party jointly engaged with state officials in a prohibited act or "act" under color of law for purposes of the Statute. To act under "color of law" does not require that the accused be an officer of the state it is enough that he is a willful participant in joint activity with the state or its agents. Citing to US v. Price 383 US 794 at 457 US 941."

We thus submit that we at least for purposes of the Court's ruling on the Notice of Removal have more than an arguable case and a substantial likelihood of success on the question of whether there is a 1983 violation, including whether or not

Sandra Schmitt falls within the zone of those who can be considered a proper Defendant in a Section 1983 action or in this particular case a proper Counter Defendant. We ask this Court in view of the substantial likelihood of success of the existence of a 1983 action that until that question is finally determined the Court should not remand the case, as the preferred jurisdictional place for resolving these constitutional questions is this Court rather than the state court, especially where we have seen the state court acting contrary to the U.S. Constitution in depriving this Defendant-Counter Plaintiff of the possibility of a fair hearing on the question of whether there is in personam jurisdiction without submitting to the jurisdiction of the Court. Kim Schmitt here has entered a special and limited appearance in state court to raise these issues but has not been successful. The fact that he took an Interlocutory Appeal limited to the question of jurisdiction does not deprive this court of jurisdiction. This view is consistent with the Seventh Circuit's holding in Rothner v. Chicago 879 F 2d 1402 (7th Cir. 1989).

30. In Rothner the Plaintiff challenged the filing of a Motion for TRO before the removal. The District Court

remanded the case claiming the claimant had waived its right to remand when it appeared in state court to oppose the Motion for TRO. On appeal the Seventh Circuit overruled the concept of waiver as an antiquated rule stating "we find Section 1446(b) cannot be interpreted to authorize remands on grounds of waiver, but rather the court went on to say that it depended on whether the statutory provisions on removal were complied with. That case has relevance here as we are here operating on the alternative to the 30 day removal period where no summons has been served on Counter-Plaintiff Kim Schmitt and no answer or responsive pleading has ever been filed by Defendant Kim Schmitt, who has at all times only entered a special and limited appearance and has at all times challenged jurisdiction, including the Interlocutory Appeal which was based exclusively on the question of jurisdiction. As previously stated the mandate has not yet issued on the Appeals process and the Appeals process is still ongoing before the Illinois Supreme Court thus the time for removal has not expired.

31. It should also be noted that the filing of the Notice of Removal in this case by Defendant Kim Schmitt under

common law is not considered a general appearance that waives in personam jurisdiction, see Wabash Western Railroad v. Brown 164 US 271 (1898). The Wabash case points out that an answer is contrasted with the removal of the case stating that an answer is a general appearance that is voluntarily made by the Defendant and therefore waives the right to objecting to the Court's jurisdiction, where as the appearance (in Federal Court) to remove is a state court mandated action, must be done in order to remove the case, see Wabash at 278. Another case relevant to removal where there is an issue on in personam jurisdiction and proper service, is Goldez v. Morning News 156 US 518 (1895) where the Supreme Court held that the Defendant could raise an objection to service of process in the Federal Court after the case had been removed to the federal system at 526.

32. The First Circuit in Ondis v. Barrows (1976) 538 F 2d 904 holds that the procedures to determine the existence of a federal question is what we have suggested, (although that case happens to be a diversity case) that the state claim may remain

in the federal court if the federal claim is dismissed or it may be remanded to the state court at that time.

33. The Eighth Circuit in a case almost directly on point in Murphy v. Board of Education of City of St. Louis District Court Missouri (1978) 455 F Supp 390 affirmed without opinion by the Eighth Circuit (1979) 594 F 2d 869, certiorari denied 99 S. Ct. 2407, 441 US 962, 60 L. Ed 2d 1062, in which Plaintiffs were alleged to have violated the Fourteenth Amendment and the various provisions of the Civil Rights Act of Title 42 involved all federal claims were removed under 28 U.S.C. Section 1441 (c) and the District Court held it could remove the entire case and determine all issues therein.

34. Counter Plaintiff Kim Schmitt has a reasonable likelihood of success in demonstrating Counter-Defendant unconstitutionality violated Fourteenth Amendment Due Process in utilizing 735 ILCS 5/2-203.1 which contains a total lack of standards in determining what must be shown for personal service to be "impractical" and the lack of standards in determining what constitutes a "diligent inquiry" in looking for the Defendant and what constitutes "reasonable efforts" to

demonstrate that personal service has become unsuccessful since in the language of that Section it states "the Court may order service to mean any manner consistent with due process and what constitutes "comparable" service to meet the due process test. Due process is implicit in the Section and therefore an examination of what was done here by Plaintiff Sandra Schmitt in obtaining the special order of Court on July 13 is critical.

35. In that regard the affidavit of Investigator Vincent on which they relied in addition to the William Bochte affidavit which has already been discussed was based principally upon the efforts Investigator Terry Vincent whose course of conduct in attempting to locate Kim Schmitt is set forth both by his affidavit and by merely a statement attached to their Motion for Leave to Obtain the Special Order of Court as part of a letter of June 14, 2000.

36. Plaintiff Sandra Schmitt's Motion for Service by Special Order of Court Exhibit D to Notice of Removal attaches a letter of June 14, 2000 to Mr. Kuznair the Petitioning Attorney's Motion, describing in summary fashion what supposedly constitutes the "diligent inquiry" required by Section

203.1 to locate Kim Schmitt. That document admits that the investigator without identifying who said it, was told that Kim Schmitt could be found at the home of Catherine Boness, the investigator therefore proceeded to observe the home of Ms. Boness without any further information than Mr. Schmitt was there. That information without more is pure hearsay. The letter of course indicates that Kim Schmitt was not observed at her home at any time.

37. Mr. Vincent, the Investigator did not observe Kim Schmitt at Brick's Inc. offices in Aurora, Illinois, he only notices that the front door is normally locked and therefore he said there was nothing unusual about a locked door because other vendors had to knock on the door to get in. He makes no effort to go in, according to the June 14 cover letter. It shows that Mr. Vincent never attempted to serve Kim Schmitt or made any effort to find him, it was simply observation. Clearly not a diligent search, as required by the Statute.

38. In the next to last paragraph Mr. Vincent has a belief that Kim Schmitt might be with Cathy Boness on Father's Day June 18, 2000, again he was never found there on that date.

39. On page 2 of a Memorandum prepared by Terry Vincent to the attorneys for Ms. Sandra Schmitt made part of their June 14, letter, the investigator indicates that on May 26, 2000 he started his search over the Memorial Day weekend. The search was totally unscientific, Mr. Vincent states in the first paragraph in conclusory form "I attempted service upon Kim Schmitt at 723 South LaSalle Street which is the corporate office", no indication of how he attempted service, no indication he called anyone to say he was trying to serve Kim Schmitt, he simply indicated there was a single tan car parked in front and the door was locked. He indicated he knocked repeatedly but there was no answer, that does not show any effort to diligently serve Kim Schmitt or even try to locate him. Before the Memorial Day holiday people may well take off and not be present during the holiday. Starting on May 27, 2000 Mr. Vincent claims he attempted service at the home of Ms. Cathy Boness, again no reason to believe that Kim Schmitt was there and of course he had no success. Mr. Vincent simply recites what he observed from the outside of the home. No indication how, whether he knocked on the door or what he did to attempt

service, only his observations. Similarly on May 28 Mr. Vincent again simply reflects his observation seeing a teenage girl going in and out of the house of Ms. Boness. On further days in the weekend June 2 and 3 he indicates there was no one at Ms. Boness' house, again he simply observed, that is not a diligent effort because he had no basis for believing that Kim Schmitt should be there. On June 5 after the weekend Mr. Vincent, goes back to the corporate office simply to look and see what's going on. Again he simply observed to see whether Kim Schmitt is there, but makes no effort to serve Kim Schmitt or call anyone saying he's trying to effectuate service. He does observe a white male with dark hair leaving the building contemplates, but made no attempt to determine who that person was. The investigator apparently knew that Bricks Inc. had two offices, one in Aurora where he simply observed and a second office at 3425 South Kedzie Avenue in Chicago. On June 6 he decides to go to the Chicago Office of Brick's but has no indication if Kim Schmitt might or might not be at the other office. Since there is only one investigator Mr. Vincent could have simply missed Kim Schmitt at the Chicago location without any evidence of evasion

of service. On June 6 Mr. Vincent went back to the first office in Aurora and did not find Kim Schmitt, but again he did not knock on the door or do anything, so throughout this whole week including the Memorial Day Weekend a very unscientific and unorganized effort was conducted by Mr. Vincent which cannot be considered to be a "diligent inquiry" upon which Counsel for Plaintiff Sandra Schmitt basis the inability to find Kim Schmitt.

40. The next investigation is by affidavit form also attached to the Petition filed with the Circuit Court of Kane County on July 13 but even though sworn to is not a better search. That affidavit is found as Exhibit F to our Notice of Removal. The second writing by Terry Vincent covers the period from June 15, 2000 to June 26, 2000 and was also totally unsuccessful and is also based on total generalities.

41. Mr. Vincent states on June 15 he attempted service at the Bricks Inc. location 723 South LaSalle Street, Aurora which is an office of Bricks and he claims he called by telephone and was told that Kim Schmitt was not there. This is the first time he has spoken to anyone actually asking for Kim Schmitt, but without saying who he is or what he wants it can not

support a "diligent effort". That evening June 15 he claims he attempted service at the Shore Club where he observed employees of Bricks but did not observe Kim Schmitt. Again he indicates in an affidavit in conclusory form using the words "I attempted service" but no indication that he asked for Kim Schmitt or why he picked the Shore Club. Here Mr. Vincent simply observed employees and that is not attempted service. On Friday, June 16 going into the weekend he again uses the word "I attempted service" at Bricks Inc. without giving an address of which location of Bricks Inc. It was presumably the one in Aurora and Mr. Vincent states "I was told Schmitt was not there so the inference is the only attempt he made was a telephone call without indicating who Mr. Vincent was to the person who answered the call, what he was or what he did, this is again not sufficient to show there is any evasion of service by Kim Schmitt. No inquiry was made by Mr. Vincent whether Kim Schmitt might be out of town on business, no indication that Kim Schmitt might be at another location where he does business, Mr. Vincent only talks about conclusions on which to base the evasion of service claim. On Sunday Mr. Vincent again goes to a location in Lake

Zurich not indicating why he goes there, he claims he didn't observe Kim Schmitt at that location. At June 19 he attempts service at the Kane County Courthouse merely because there was a scheduled court date in a case. There is absolutely no basis for believing that Kim Schmitt would be there. Usually a court date would not require the personal appearance of a party. Again no showing that there is any evasion of service by not appearing in court. On Tuesday, June 20 in the afternoon he claims he attempted service at the Aurora location of Bricks Inc. but again he does not indicate what he did by attempted service except to use his "term". Again it appears that all Mr. Vincent did was observe, he didn't speak to anyone, didn't say he spoke to anyone, all he observed was employees leaving the building at the end of the work day and he did not observe Kim Schmitt.

42. On Wednesday, June 21 he was at Aurora at 5:45 in the morning and at 6:00 a.m. was approached by a white male asking what he was doing there, apparently the investigator never told the white male. Again no indication that how showing he attempted service. On Thursday, the 22nd of June the investigator claims he "attempted service" at Bricks Inc. in

Chicago on Kedzie but again he does not indicate what he meant by attempted service. He simply indicates that he was informed that Schmitt was not there and he was referred to a manager, this is the first time that he even makes any effort to try to find Schmitt but again he doesn't indicate what he said or who he said he what to or why he wanted to talk to a manager. On Friday the 23rd of June 2000 after the whole week is almost up, Mr. Vincent again claims he attempted service at Kedzie in Chicago but again he does not indicate what he means by attempted service, so this is totally conclusory, and totally inadequate to show an evasion of process or a diligent effort. He was told by the office on that day that Schmitt was not there and again was referred to a manager. Again Schmitt not being at the Chicago office and the investigator not knowing whether he was

at the Aurora office and having only one investigator, is certainly not a thoughtful, efficient way, to determine evasion of process. On Saturday June 24 Mr. Vincent claims he attempted service at the Kedzie location in Chicago, again he does not say what he meant by attempted service all he indicated is that he observed

workers who related that Schmitt was not there. Observing workers who relate that Schmitt is not there is not attempting service on Schmitt. On June 26, Monday, Mr. Vincent goes to the Kane County Courthouse and, does not observe Schmitt, apparently be expected to find Schmitt because Schmitt had some matter in Court but there was again no reasonable basis to believe that Mr. Schmitt would come to the Courthouse rather than his attorney and so, again Kim Schmitt cannot be said to be evading process. On Sunday June 25 he claims at 1:45 pm he stopped at the office of the company on South Kedzie in Chicago, the office stated Schmitt was not there and he claimed he had no information regarding his whereabouts. This is the first time that he actually seems to ask where Schmitt may be. In totality this was not due diligence consistent with the statute and demonstrates the abuse and denial of due process that takes place when statute has no standards.

43. While the Appellate Court on April 27, 2001 according to paragraph 11 of the Remand Motion affirmed the Orders of August 2, Appealed from in the Interlocutory appeal. Kim Schmitt through his attorneys filed a timely petition for

Rehearing which was denied on May 22 as per paragraph 15 of the Remand Motion. The mandate having not issued as a timely affidavit for leave to appeal to the Illinois Supreme Court was filed, the question of whether there is in personam jurisdiction upon Kim Schmitt through the service of Catherine Boness, it still will not be finally resolved until the Illinois Supreme Court decides whether or not to accept the case.

44. Plaintiff Sandra Schmitt is simply wrong in paragraph 17 of their reading of Lugar v. Edmonson Oil Co. 1982 102 S. Ct. 2744, 457 US 922 73 Lawyer's Ed 2d 482. For the reasons set forth above Sandra Schmitt acted under color of state law in proceeding with service upon Catherine Boness pursuant to an erroneous order of July 13, 2000 which assumed that an employee of a corporation without having pierced the corporate veil can be served in lieu of the Defendant. The thought, presumably, behind the Judge's Order was that Catherine Boness would give notice to Ms. Schmitt because she was his paramour but in fact the Second District agreed that there was no evidence that she was the paramour for the reasons already set forth above. The conclusory affidavit of William

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it was simply acting as an arm of the state and where it placed a person following the policy of the Regulatory Authority in a position of power that person is held to be an actor of the state unless the restaurant in question was simply a private restaurant who had leased property from the state authority. The failure to service a Black person in a restaurant was found to be state action the court stating at 365 US 725:

> ". . . by its inaction, the Authority and through it the State, has not only made itself a party to refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependency with Eagle that it must be recognized as a joint participant in the challenged activity which on that account cannot be considered to have been so purely private as to fall out the scope of the Fourteenth Amendment."

We would submit in our case that but for the Order of Judge Golden service upon Catherine Boness in lieu of in personam service upon Kim Schmitt could not have occurred so here the state has surely insinuated itself far more that it did in the Burton v. Wilmington case. Thus the case cited by Counsel for Sandra Schmitt in paragraph 17 Moose Lodge does not stand for the proposition that it claims to stand for.

50. In paragraph 18 Plaintiff Sandra Schmitt raises the argument that she has not acted sufficiently under color of state law by following the Judge's Order yet it would seem after looking at the Burton case cited within the Moose Lodge case cited by Sandra Schmitt that clearly she falls within that characterization.

51. In paragraph 20 Plaintiff Sandra Schmitt cites to the US Supreme Court's decision in Dennis v. Sparks 449 US 24, 101 S. Ct. 182 66 L. Ed 2d 185 (1980) that was case where it was alleged that the private party was a co-conspirator with the Judge who rendered an Order and even though the Judge himself would have been immune the private party could have standing to bring a 1983 action under color of state law. While we do not allege there is any conspiracy between Sandra Schmitt and the Judge we would submit that the same rationale nevertheless applies here. The effect is for Sandra Schmitt to act pursuant to the Judge's Order.

52. Justice White in rendering the decision in Dennis stated the principal under which the US Supreme Court operates

in this area which is to hold "under color of state law for Section 1983 purposes:

". . . does not require that the Defendant be an officer of the State. It is enough that he is a willful participant in joint action with the state or its agents, private persons jointly engage with state officials in the challenged action or acting under color of state law for purposes of 1983 cited cases. At 449 US 27."

In Dennis it was alleged that the private party was a citizen who "corruptly conspired with the Judge in connection with his decision making and therefore the private party was found to be acting under color of state law within the meaning of Section 1983, 449 US 29 and the Court found that the Complaint, which was all that the Court ruled upon, was not defective on the issue of state action or color of state law. The issue essentially turned on whether the individuals were performing a state judicial act and therefore the immunity of the Judge could come into play and the Court said:

> "Here there could be no claim that Petitioner or any of the other private parties were actually performing a judicial act or was in any sense an official aide of the Judge. 449 US 30"

The Court went on to state that even if the Judge were excused from testifying (because of his immunity) it would not follow that

actions against private parties must be dismissed. 449 US 30. We submit the same rule ought to apply here to our 1983 claim.

53. For the reasons argued within here we respectfully move that the Motion to Remand be denied.

Respectfully submitted,

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Gerard C. Smetana

Gerard C. Smetana
Smetana & Avakian
39 S. LaSalle Street
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312-357-0250

Date: June 25, 2001

Disbursements from anticipated proceeds of the sale of Lot 36
Anticipated proceeds after Real Estate Commission, Title Fees, Transfer Taxes, etc. approximately $310, 000. 00

Item	Amount
Lakeside Bank-Lender	150,000.00
Professional Fees & Wages (45 Days)	19,500.00
(No payments to Kim Schmitt or Mrs. Lois	
Building Permits	4,318.00
Blueprints	1,025.00
Utility Connections	6,575.00
Excavation Contractors	6,620.00
Concrete Contractors	45,213.00
Lumber Material Suppliers	23,667.00
Carpentry Contractors	46,626.00
Drywall Contractors	7,980.00
Roofing Contractors	2,404.00
Total	313,928.00

C.B.C. Bricks, Inc. Construction Related Liabilities

Item	Amount
Building Permits	12,771.00
Blueprints	1,831.00
Architectural Fees	17,280.00
Surveying Fees	5,670.00
Supervision Labor	25,440.00
Advertising	4,070.00
Electric Connections	1,350.00
Utility Connections	18,099.00
Excavation Contractors	18,285.00
Driveway Paving Contractors	7,704.00
Concrete Contractors	63,612.00
Structural Steel Suppliers	6,348.00
Masonry Labor Contractors	29,288.00
Fireplace Supplier	4,306.00
Rough Carpentry Contractors	68,616.00
Trim Carpentry Contractors	14,520.00
Millwork Material Suppliers	26,391.00
Cabinet Suppliers	20,542.00
Lumber Material Suppliers	66,595.00
Wood Stairs Contractors	6,466.00
Wood Deck Contractors	3,974.00
Entrance Door Suppliers	2,067.00
Exterior TO Material Suppliers	1,100.00
Cabinet Top Suppliers	6,098.00
Window Suppliers	28,575.00
Skylight Material Suppliers	1,154.00
Insulation Contractors	11,076.00
Caulking Labor & Materials	75.00
H.V.A.C. Contractors	20,224.00
Roofing Contractors	7,574.00
Siding Contractors	13,318.00
Gutters & Downspouts	3,279.00
Plumbing Contractors	32,713.00
Electrical Contractors	17,628.00
Light Fixture Suppliers	4,726.00

Drywall Contractors	26,311.00
Painting Contractors	11,120.00
Carpeting Contractors	4,005.00
Ceramic Tile Contractors	3,707.00
Wood Flooring Contractors	10,810.00
Specialty Fixtures Suppliers	334.00
Mirror Contractors	1,110.00
Shower Doors Suppliers	1,072.00
Bath Accessories Materials	265.00
Appliances Vendors	3,629.00
Landscaping Contractors	2,984.00
Warranty Fees	900.00
Refuse Removal Companies	1,500.00
Cleaning Labor Contractors	1,200.00
Totals	641,712.00